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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 393

CHRISTINE COLLINS, A. J. CUMMINS, YANCEY LEE CUMMINS AND EDWARD J. MILLER, PETITIONERS,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

PETITION FOR CERTIORARI FILED AUGUST 31, 1945.

CERTIORARI GRANTED NOVEMBER 5, 1945.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 20, 1945.

IN UNITED STATES EMERGENCY COURT OF APPEALS

GEORGE C. COLLINS, JR., CHRISTINE COLLINS, A. J. CUMMINS, Yancy Lee Cummins and Edward J. Miller, Complainants,

vs.

CHESTER BOWLES, Price Administrator, Respondent

COMPLAINT—Filed June 22, 1945

The complaint of George C. Collins, Jr., Christine Collins, A. J. Cummins, Yancey Lee Cummins and Edward J. Miller, respectfully shows that:

I. The names and postoffice addresses of the complainants are:

George C. Collins, Jr., Glenview, Ky.
Christine Collins, Glenview, Ky.
A. J. Cummins, 3020 Poppy Way, Louisville, Ky.
Yancey Lee Cummins, 3020 Poppy Way, Louisville, Ky.
Edward J. Miller, 2059 Eastern Parkway, Louisville, Ky.

II. The regulations, orders or price schedules protested and the effective dates thereof are:

(a) The General Maximum Price Regulation issued by the Price Administrator on the 28th day of April, 1942, pursuant to the Emergency Price Control Act, effective May 11, 1942.

(b) M. P. R. 193 issued August 2, 1942, effective August 5, 1942.

(c) Any amendments thereto sought to be injected into this proceeding as being applicable to the transactions hereinafter mentioned, including the price schedules promulgated under the authority of either General Maximum Price Regulation or M. P. R. 193.

III. Complainants filed their protest herein before the Price Administrator on May 4, 1945. On the 2nd day of June, 1945, the Price Administrator entered an order dismissing said protest on procedural grounds and without referring the protest to a Board of Review for decision on the merits.

IV. The manner in which the complainants have been aggrieved by the dismissal of their protest is as follows:

(1) The Price Administrator erroneously declined to consider the objections interposed in the protest to the regulations aforesaid that were protested.

(2) The Price Administrator erroneously concluded that it was a necessary requisite for his consideration of the objections to the regulations that complainants likewise protest Regulation 445 that was issued August 14, 1943, long after the transactions hereinafter set forth occurred.

(3) The Price Administrator erroneously concluded that because General Maximum Price Regulation aforesaid and M. P. R. 193 aforesaid had, subsequent to the transactions mentioned in the protest, been rescinded and superseded by M. P. R. 445 as to distilled spirits, he could no longer consider the objections to General Maximum Price Regulation aforesaid or M. P. R. 193, despite the fact that the Price Administrator relies upon the latter regulations to

collect treble damages in a case pending against Complainants in Kentucky.

(4) The Price Administrator erroneously concluded that the protest failed to comply with Section 203(a) of the Emergency Price Control Act, as amended.

(5) The Price Administrator erroneously concluded that the complainants had no right to file the protest.

(6) The Price Administrator erroneously concluded that the protest of the complainants was not in compliance with the provisions of the Emergency Price Control Act, as amended, and more particularly section 204 (e) thereof, and erroneously concluded that to consider the merits of this protest would circumvent the Act.

(7) The Price Administrator, in effect, erroneously concluded that the only recourse of complainants was to file a petition in the Federal District Court and get leave to file a complaint direct to this Court, which assumption is contrary to the express provision of section 203(a) of the Emergency Price Control Act, as amended.

(8) The Price Administrator erroneously concluded that because the complainants owned no warehouse receipts after January 9, 1943, they were without right to file the protest because that date was before the effective date of Maximum Price Regulation 445.

(9) Because the Price Administrator failed to sustain the protest.

(10) Because the Price Administrator failed to have their protest considered by a Board of Review, as requested in their protest despite the fact that Section 203(c) of the Emergency Price Control Act, as amended, makes such consideration *mandatory* upon request of a protestant.

(11) The dismissal by the Price Administrator of the protest was such a denial of a reasonable opportunity to be heard as constituted an offense against the due process clause of the Fifth Amendment of the Federal Constitution.

V. The complainants were without right to protest a regulation not in existence at the time of their alleged sale of warehouse receipts for whiskey in January, 1943, and the Price Administrator had, on May 7, 1943, filed his petition against them by reason of such sale seeking triple damages. General Maximum Price Regulation aforesaid, and M. P. R. 193 are the regulations with which the complainants are charged as having violated in the aforesaid suits, and the only regulations involved therein.

VI. The objections asserted in the protest against the regulations, orders and price schedules protested, which are intended to be relied upon in support of the complaint, are as follows:

(a) The General Maximum Price Regulation issued April 28, 1942, does not apply to warehouse receipts issued against whiskey stored in warehouses generally.

(b) Warehouse receipts for whiskey are not commodities but are mere evidences of ownership of an interest in the commodities, without right of either of these protestants at any time to possess, sell or otherwise dispose of the whiskey covered thereby.

(c) Warehouse receipts in the hands of these protestants as owners were and are negotiable securities and made so by the laws of the Commonwealth of Kentucky where they were issued and where they were owned by these protestants and where they were sold as hereinafter set forth.

(d) The Commonwealth of Kentucky, following the adoption of the Twenty-first Amendment, adopted a com-

prehensive control and price-fixing statute long prior to the enactment of the Emergency Price Control Act, and was actively, and has been actively, enforcing that Act, the terms and provisions of which are contrary to the terms and provisions of General Maximum Price Regulation aforesaid and M. P. R. 193 aforesaid, if those regulations are construed to be in conflict therewith, and these protestants assert that they are in conflict therewith.

(e) That both the General Maximum Price Regulation aforesaid and M. P. R. 193 aforesaid, if held to be applicable to warehouse receipts for whiskey handled or sold within the Commonwealth of Kentucky, are unconstitutional and void because Kentucky has appropriated unto itself regulations, including price-fixing, which are contrary thereto.

(f) Both the General Maximum Price Regulation and M. P. R. 193 are so vague and indefinite in their terms and so impossible of interpretation that even the Office of Price Administration was unable to conclude that they, or either of them, covered warehouse receipts for whiskey, and as a result of the confusion created, the Office of Price Administration, to clarify the confusion thus created by attempting to apply those regulations to warehouse receipts, adopted for the first time a ceiling on warehouse receipts as of February 3, 1943, long after the sale of the warehouse receipts here involved. Those regulations were so confusing that the whiskey trade generally, after consulting with various enforcing officers, came to the conclusion, without objection from the Price Administrator's Office, that warehouse receipts were not covered, and accordingly the trade generally bought and sold warehouse receipts until February 1943, without any thought that they could possibly be violating either one of the foregoing regulations.

VII. The facts upon which these complainants relied to support their protest are as follows:

(a) At all the times mentioned herein, the protestants were, and are now, citizens of, and resided in, the Commonwealth of Kentucky where all of the transactions hereinafter referred to occurred.

(b) Prior to December 1, 1942, protestants, and each of them, were owners and holders of common capital stock of the Cummins Distilleries Corporation, a Delaware corporation, with its principal office at Louisville in the Commonwealth of Kentucky, and which corporation conducted all of its business, at all the times hereinafter mentioned, in Kentucky where it owned and was operating a distillery, including certain bonded warehouses in which it had stored approximately 51,000 barrels of bourbon whiskey. The protestants owned, at the aforesaid time, in their own right common capital stock of said corporation as follows:

George C. Collins, Jr.	10,523 shares
Christine Collins	10,524 shares
A. J. Cummins	16,890 shares
Yancey Lee Cummins	1,238 shares
Edward J. Miller	175 shares
making a total of	39,350 shares

Each of these shares had a par value of $1.00 and a fair market value as of December 1, 1942, of approximately $13.00 per share, or a total market value of all shares owned by them of $511,550.00.

(c) On November 30, 1942, the Board of Directors of the aforesaid corporation adopted a resolution calling a meeting of the stockholders to be held on December 24, 1942, for the purpose of voting on the question of liquidation of

the corporation under the laws of Delaware. Pursuant to that resolution, notice was given to each of the holders of outstanding stock of said corporation, and a meeting of the stockholders of the corporation was duly held on December 24, 1942, with the owners of 185,656 shares of the common capital stock present in person or by proxy out of a total common capital stock of 219,207 shares. At this meeting more than two-thirds of the outstanding stock was present and voted in favor of the liquidation of said corporation, and minutes of all of the foregoing steps were carefully kept and recorded in the minute books of said corporation. After the foregoing meeting of the stockholders of the Cummins Distilleries Corporation was held as aforesaid, and on December 24, 1942, the Board of Directors of said corporation, in obedience to the laws of the State of Delaware, and pursuant to the resolutions aforesaid took active steps to wind up the corporation and surrender its charter to the State of Delaware.

(d) On December 24, 1942, and following the meeting of the stockholders aforesaid, the Board of Directors of said corporation approved a plan of complete liquidation of said corporation, in accordance with the resolutions adopted by the stockholders, and after making provision for the payment of all of its debts and other liabilities, made a distribution in kind of the warehouse receipts issued by it against the whiskey it owned and had stored in its warehouses aforesaid, ratably and proportionately to each and all of its stockholders, including these protestants. Thereafter, and on December 29, 1942, the aforesaid warehouse receipts were delivered to the stockholders of the corporation in accordance with the resolutions adopted on December 24, 1942. From December 29, 1942, the Cummins Distilleries Corporation never owned or had any interest in either one of the warehouse receipts so distributed to its stockholders aforesaid. From December 24, 1942, the Cummins Dis-

tilleries Corporation never did any new business, but confined itself exclusively to the winding up of its affairs by its Board of Directors in accordance with the laws of Delaware, which laws gave it a limited time within which to wind up its affairs and close its business.

(e) On December 31, 1942, the proper officials of the State of Delaware recognized the validity of the dissolution of the Cummins Distilleries Corporation, and under and pursuant to the laws of that State caused to be issued and delivered to the Cummins Distilleries Corporation its certificate of dissolution. The foregoing steps of the directors were recorded properly in the minutes of the corporation, and the original certificate of dissolution was delivered to the directors of said corporation, photostatic copies of all of which documents are filed herewith as a part hereof and numbered as hereinafter set forth.

(f) Beginning January 4, 1943, and within Kentucky, the stockholders of the Cummins Distilleries Corporation aforesaid sold and delivered their warehouse receipts to purchasers willing to pay therefor, the last sale being on or about January 9, 1943, which was in strict accord with Kentucky law.

(g) Prior to all of the times hereinabove mentioned, and prior to the existence of the Price Control Act adopted by the Congress of the United States, and following the adoption of the Twenty-first Amendment to the Constitution of the United States, the Commonwealth of Kentucky, by and through its legislative department, adopted what is known as its Alcoholic Beverage Control Act, being Chapter 241 of Kentucky Revised Statutes for 1942 and Sections 241.010 to and including 242.090. By that Act the Commonwealth of Kentucky appropriated to itself sole and exclusive control over the manufacture, distribution, transportation, possession and sale of alcoholic beverages within the

Commonwealth of Kentucky, and took active control over all alcoholic beverages within the Commonwealth of Kentucky, including every beverage of any kind that contained alcohol or malt beverage except the proprietary or patent medicines.

(h) As a companion Act the legislative department of the Commonwealth of Kentucky adopted what is known as its Alcoholic Beverage-License and Tax Act, being Chapter 243 of Kentucky Revised Statutes aforesaid, Sections 243.020 to and including 245.990. By the terms of said statute the Commonwealth of Kentucky acquired sole and exclusive control over the traffic in alcoholic beverages as defined in said statute, over distilleries, wholesalers, retailers and every other form of traffic relating to the sale, transportation, possession or handling of alcoholic beverages, and authorized the levying and collection of taxes thereon for the protection of its revenue.

(i) In addition thereto, the Commonwealth of Kentucky adopted what is known as its Distilled Spirits and Wine Fair Trade Act, being Chapter 13 of the Acts of the General Assembly for 1940, under the terms of which it fixed the prices for the sale of alcoholic beverages defined in all of the foregoing Acts, who could sell, who could not sell, places where it could be sold, the containers in which it must be sold; and with suitable provision for taxation of the article and the protection of its revenue therein in the licensing and handling thereof;

(j) To enforce each and all of the aforesaid acts, and by the terms of the first above-mentioned Act, it created what is known as its Alcoholic Beverage Control Board, provided for appointments, vested in said Board the authority set forth in the statute, and authorized it to make regulations to carry into effect the terms and provisions of all of the aforesaid Acts. The Board thus provided

for was duly appointed, and after promulgating what it termed to be proper regulations, proceeded to function as such, and has at all times actively and aggressively functioned as such in the enforcement of said Acts within the Commonwealth.

(k) In adopting all of said Acts, it was the purpose of the Commonwealth of Kentucky thereby to take exclusive control of all alcoholic beverages where the sales were made either to purchasers within the Commonwealth of Kentucky and where transportation of the article was originated in Kentucky, or originated elsewhere and shipped into Kentucky, and likewise take exclusive control of the manufacture of such alcoholic beverages within the Commonwealth.

(l) After the adoption of all of the foregoing Acts, and in the case of *Reeves, Commissioner of Revenue* v. *Simons*, 289 Ky. 79, decided March 13, 1942, the Court of Appeals construed and held each of said Acts to be constitutional. In this case the constitutionality of the Fair Trade Act aforesaid was particularly attacked, and the Court of Appeals held it, as well as the whole legislative scheme in the control of alcoholic beverages within the Commonwealth, to be constitutional and the law of the Commonwealth with respect thereto. In stating the statutes before the court, it said:

> "This state rigidly controls the sale of liquor and wine from the distiller to the wholesaler, and from the wholesaler to the retailer.
>
> "Section 2554c-1 is to the effect that except as is otherwise provided, the Act shall be administered under the Alcoholic Beverage Control Law of 1938 (Chapter 2 of the Acts of that year, now Sections 2554b-97 to 2554b-222 of Kentucky Statutes, Baldwin's 1939 Supplement)."

The Act was challenged, as stated by the court, upon the following grounds:

> "Plaintiff's challenge of the constitutionality is under Sections 3, 19, 27, 28, 29, 51 and 109 of the Kentucky Constitution, and under the Due Process Clause of the Fifth and Fourteenth Amendments to the Federal Constitution."

(m) The Court of Appeals of Kentucky is the court of last resort of the Commonwealth of Kentucky, so by the authority of both the legislative and judicial departments of the Commonwealth of Kentucky, complete and absolute control of the manufacture and sale of alcoholic beverages within the terms of the statute, and which terms of the statute cover the product of the Cumming Distilleries Corporation made in accordance with the terms of that statute, has been taken by the Acts aforesaid, and the prices for the sales thereof fixed and administered by the proper officials of that Commonwealth.

(n) By the foregoing statutes and regulations made thereunder, the Commonwealth of Kentucky fixed the public policy of that State with respect to alcoholic beverages within the Commonwealth of Kentucky from and including the manufacturer to the consumer. As a part of that policy it was deemed necessary to fix the prices from distiller to consumer in order to prevent cut-throat prices, bootlegging and other methods of unfair competition that were about to demoralize and destroy the industry within the Commonwealth. It was likewise deemed to be desirable in order to protect citizens as well as the trade from the operation of dives and the sale of alcoholic beverages unfit for human consumption, and confine the trade into legal channels so as to afford a decent administration and control of the traffic within the boundaries of the Commonwealth, and prevent the shipment into Kentucky of beverages contrary

to its laws and the shipment out of Kentucky of such beverages into those communities that had prohibition.

(o) Each of the foregoing Acts provided heavy penalties for the violation thereof, including revocation and suspension of licenses.

(p) By the terms of the Acts aforesaid, all distilleries within the Commonwealth were required to procure licenses from the Commonwealth of Kentucky to manufacture distilled spirits. No liquors covered by the Act that were stored in warehouses could be withdrawn from the warehouses by the owners of warehouse receipts except and unless those owners were licensed to withdraw the same, and no liquor stored in warehouses thus licensed could be withdrawn from the warehouses by anyone, including a licensed operator, in barrels, and no such liquor could be delivered by a distillery to a licensee within the Commonwealth of Kentucky in containers containing in excess of one quart, and all of it had to be packaged in glass. There was no such thing under the laws of Kentucky as withdrawing from the warehouse thus maintained a barrel of whiskey called for by the receipts issued as hereinafter set forth, and no owner of a warehouse receipt could possess any part of the whiskey unless he was a licensee to do the particular thing with the liquor authorized to be done. A consumer or non-licensed person could not present a warehouse receipt, under the laws of Kentucky aforesaid, and obtain any liquor either in pints, half-pints or quarts, and no licensed bottler could receive distilled spirits and do other than package it in glass containers, and, after packaging, it had to be sold to wholesalers who in turn were compelled to distribute the liquors to retailers, and who in turn were compelled to sell

to the consuming public, all of which was under strict regulation.

(q) After the adoption of the Twenty-first Amendment to the Constitution of the United States, many small distilleries were organized and began to operate within the Commonwealth of Kentucky, but with little capital, and in order that such distilleries, included among which was Cummins Distilleries Corporation aforesaid, could finance themselves by the sale to the public of warehouse receipts issued by them for whiskey in storage, the Commonwealth of Kentucky adopted what is known as its Uniform Warehouse Receipts Act, being Chapter 358, Sections 358.010 to 358.590, in which it has declared warehouse receipts to be negotiable instruments and placed them on the footing of a foreign bill of exchange, and after prohibiting the sale of whiskey in any form except through licensees and under the control aforesaid, authorized the sale of warehouse receipts for alcoholic beverages, but prohibited the owner thereof from actually withdrawing or possessing the whiskey unless and except the owner possessed not only the warehouse receipts but the proper licenses issued under the Alcoholic Beverage Control Act aforesaid. (See Section 243.130, Alcoholic Beverage Control Act.)

In this Act it designated the warehouses in which alcoholic beverages could be sold, required the payment of all taxes due the Commonwealth of Kentucky before any distilled spirits could be withdrawn from the warehouses, which included both production, excises and ad valorem taxes.

(r) All of the whiskey aforesaid stored in the warehouses of Cummins Distilleries Corporation, receipts for which were distributed in kind to the stockholders aforesaid, was manufactured, stored and handled by said distilleries under and pursuant to the provisions of the aforesaid Acts.

(s) As result, warehouse receipts became negotiable instruments on a parity with stocks and bonds, and were offered and sold throughout the United States to the public freely and in large volume for investment purposes, so advertised, and many States of the Union denounced warehouse receipts as securities and assumed control over the sale thereof. Not only so, but the smaller distilleries, and in fact most all distilleries, used them as collateral for the borrowing of money for operating capital, and they were received by banks throughout the United States as collateral on a parity with promissory notes, stocks and bonds.

(t) By the foregoing Acts, it was the policy of Kentucky, in the enforcement of its control of the traffic in alcoholic beverages, to fix a minimum price at which it should be sold and the whole structure of the Kentucky control will fall and be of no avail and will accomplish none of the purposes sought to be accomplished by the legislative department of the Commonwealth of Kentucky unless and except that minimum price schedule is maintained.

(u) The General Maximum Price Regulation or March ceiling aforesaid, which became effective in May, 1942, under the terms of which it undertook to fix the maximum prices of all commodities within the United States, exempted securities from the provisions thereof. By the adoption of M. P. R. 193, which became effective August 5, 1942, the Price Administrator undertook to fix the maximum price of distilled spirits within the United States, but after fixing those maximum prices there was set forth in said M. P. R. 193 its Section 1420.2 in the following language:

> "Lower prices than those set forth in appendix (a) (Section 1420.13) may be charged, demanded, paid or offered."

(v) Neither of these regulations applied to the sale of warehouse receipts, but both regulations were in direct conflict with the Kentucky Fair Trade Act, and both of said regulations, as applied to the Commonwealth of Kentucky, are ineffective as to distilled spirits sold in Kentucky by reason of the fact that the Federal Government is without power to enforce a maximum price contrary to the provisions of the Kentucky price-fixing statute aforesaid.

(w) At the time the protestants, along with all other stockholders of the Cummins Distilleries Corporation, sold their warehouse receipts as aforesaid, the whiskey against which they were issued was in Kentucky and no part of it was moved out of Kentucky at any time while they were the owners of the warehouse receipts, and the sale of said warehouse receipts was consummated within the boundaries of the Commonwealth of Kentucky.

Neither of these protestants, at the time title to said warehouse receipts devolved upon them as a matter of law, and as they are advised, believe and now state, none of the stockholders of Cummins Distilleries Corporation, had the right, power or authority, under the law, to withdraw any whiskey covered by the warehouse receipts they owned and sold, or, in other words, their status as such owners of such warehouse receipts was the status created by the statutes of Kentucky aforesaid for the control of the liquor industry in Kentucky and to protect the revenues of the Commonwealth of Kentucky.

(x) Notwithstanding all of the foregoing facts, and in June, 1943, the Office of Price Administrator filed in the Federal District Court for the Western District of Kentucky Action No. 584, the style of which was Prentiss Brown, Price Administrator, Office of Price Administration, for and on behalf of the United States, v. Cummins

Distilleries Corporation and a large number but not all of the individual stockholders of Cummins Distilleries Corporation. In said suit, however, these protestants have been included as defendants. In this petition it is charged that either the Cummins Distilleries Corporation or these protestants, or both of them, sold approximately 51,000 "barrels of Bourbon whiskey" at prices above the ceiling fixed by M. P. R. 193, and judgment is sought in triple damages in the sum of $6,799,101.51 against each of these protestants as well as all stockholders sued, but not all of the stockholders of Cummins Distilleries Corporation were sued in said action.

(y) Of even date with the filing of said action, the Office of Price Administrator filed Action No. 585, in the Federal District Court aforesaid, the style of which is Prentiss Brown, Price Administrator, Office of Price Administration, for and on behalf of the United States, v. Cummins Distilleries Corporation and its directors, including one of these protestants, A. J. Cummins, in which it is charged that the General Maximum Price Regulation, adopted May 11, 1942, applied to the sale of packaged goods sold by Cummins Distilleries Corporation or the directors in the alternative, in violation of said regulation, and judgment is sought in said action for triple damages in the amount of $180,055.98.

(z) Each of said suits alleged the sale of alcoholic beverages as defined by Kentucky Statutes within Kentucky, and in each of said suits the present Administrator has been substituted as plaintiff, successor to Prentiss Brown.

VIII. Complainants filed in support of their protest, and the respondent now has Exhibits Nos. 1 to 7, both inclusive, consisting of the following in seriatim:

No. 1. Copy of the minutes and proceedings of stockholders of the Cummins Distilleries Corporation, including photostatic copy of Certificate of the State of Delaware showing that Delaware had recognized the proceedings as being in accordance with the laws of the State of Delaware.

No. 2. Printed copy of the Statutes of Kentucky referred to in the Statement of Facts.

No. 3. Copy of the petition in Action #584 now pending in Kentucky.

No. 4. Original affidavits of protestants.

No. 5. Facsimile of warehouse receipt issued by Cummins Distilleries Corporation.

No. 6. Affidavits of Earl Muir and C. G. Faine.

IX. The complainants, in their protest filed aforesaid, protested the regulations in their own behalf and in behalf of all other stockholders of Cummins Distilleries Corporation sued in Action #584 (Exhibit 3), because the facts alleged herein and in the protest are common to all stockholders, and the decision of the matters herein set forth could not be otherwise than common to all stockholders.

X. The nature of relief requested by the complainants is as follows:

(a) That this their complaint be filed;

(b) That this Court reverse the action of respondent in dismissing their protest on procedural grounds and return the protest to respondent with directions to refer the protest to a Board of Review for decision upon the merits as is

required by Section 203(c) of the Emergency Price Control Act, as amended;

(c) That the General Maximum Price Regulation issued April 28, 1942, effective May 11, 1942, and M. P. R. 193 issued August 2, 1942, effective August 5, 1942, and all schedules issued under either of said regulations be construed by this Court, and that it be held that neither of said regulations applied to or reached warehouse receipts, or the sale thereof, that were owned by complainants and described in this complaint.

(d) That it be held by this Court that warehouse receipts for whiskey stored in bonded warehouses, as hereinabove set forth, and particularly the warehouse receipts of complainants and stockholders of Cummins Distilleries Corporation, are expressly exempted from the provisions of the General Maximum Price Regulation aforesaid by its terms and that said warehouse receipts be held, under the facts, to be securities within the terms of said regulation.

(e) That General Maximum Price Regulation and M. P. R. 193, as in effect during January, 1943, and each of them, be held not to have any application to sales of warehouse receipts such as were sold by complainants in January, 1943.

(f) In the alternative, if the complainants are not sustained as to either one or all of the foregoing propositions, then and in that event they pray that it be held that General Maximum Price Regulation and M. P. R. 193, and each of them, be held to be unconstitutional and void when sought to be applied in Kentucky to the sale of distilled spirits in any form, and to be beyond the power of the Congress as well as the Administrator.

(g) For their costs herein expended, and for all other further and general relief to which they may be entitled in the premises.

Dated at Washington, D. C., this 22d day of June, 1945.

JOHN K. SKAGGS,
Kentucky Home Life Bldg.,
Louisville, Ky.
ALLEN P. DODD, SR.,
Marion E. Taylor Bldg.,
Louisville, Ky.
MAX O'REIL TRUITT,
1616 K Street, N. W.,
Washington, D. C.

[fol. 20] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 5, 1945. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 239

GEORGE C. COLLINS, JR., et al.

v.

CHESTER BOWLES, Price Administrator

MOTION TO DISMISS THE COMPLAINT

Now comes Chester Bowles, Price Administrator, Respondent, by his duly authorized attorney, and pursuant to Rule 13 of the Rules of this Court, moves the Court to dismiss the complaint filed herein on the ground that said complaint fails to state a claim upon which relief can be granted.

A memorandum in support of this motion is submitted herewith.

Respectfully submitted, Richard H. Field, General Counsel.

[fol. 21] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 5, 1945. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 239

GEORGE C. COLLINS, JR., et al.

v.

CHESTER BOWLES, Price Administrator

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT

[fol. 22] On June 22, 1945, the above-entitled complaint was filed with this Court. The complaint alleges that on May 4, 1945, Complainants filed a protest with the Price Administrator objecting to certain provisions of the General Maximum Price Regulation and Maximum Price Regulation No. 193 (Comp. Par. III). It appears that the ap-

plicable provisions of the General Maximum Price Regulation were superseded on August 1, 1942, by Maximum Price Regulation No. 193 (7 F. R. 6006) and that these provisions in turn were superseded on February 3, 1943, by Amendment No. 4 to Maximum Price Regulation No. 193 (8 F. R. 1632) and on August 8, 1943 by Maximum Price Regulation No. 443 (8 F. R. 11161) (Comp. Par. VI(f)). It further appears that the protest was concerned with the effect upon past transactions of these superseded regulatory provisions (Comp. Pars. V, VII(y)).

The complaint is directed against an order issued by the Price Administrator on June 2, 1945, dismissing the protest (Comp. Pars. III, IV).[1] However, this order is clearly [fol. 23] consistent with decisions of this Court holding that protest proceedings may not be employed to secure determinations of the validity of regulatory provisions which have been superseded prior to the filing of the protest. *Chas. A. Krause Milling Co. v. Bowles*, (No. 203, April 12, 1945); *Eastern Wine Corporation v. Bowles*, (No. 213, May 17, 1945). *Cf. Thomas Paper Stock Co. v. Bowles*, 148 F. (2d) 831 (E. C. A. 1945) cert. granted June 4, 1945 (13 U. S. L. W. 3465).

The complaint should therefore be dismissed.

Respectfully submitted, Richard H. Field, General Counsel.

[fol. 24] EXHIBIT A

United States of America

Before the Office of Price Administration

Docket No. GF1-1142-P

In the Matter of GEORGE C. COLLINS, JR., et al., Protestants

ORDER DISMISSING PROTEST

On May 4, 1945, George C. Collins, Jr., and Christine Collins, of Glenview, Kentucky, and A. J. Cummins, Yancey Lee Cummins, and Edward J. Miller of Louisville,

---

[1] Certified copies of the order and accompanying opinion are annexed hereto as Exhibits A and B, respectively.

Kentucky, filed a protest against provisions of the General Maximum Price Regulation and of Maximum Price Regulation No. 193. The protest does not comply with Section 203(a) of the Emergency Price Control Act for the reasons set forth in the opinion accompanying this order and must be dismissed.

Therefore, in accordance with the Emergency Price Control Act of 1942, as amended, and Revised Procedural Regulation No. 1, it is ordered that said protest, Docket No. GF1-1142-P be, and it hereby is, dismissed.

Issued and effective this 2 day of June, 1945.

(Signed) Chester Bowles, Administrator.

[fol. 25] UNITED STATES OF AMERICA

Before the Office of Price Administration

Docket No. GF1-1142-P

In the Matter of GEORGE C. COLLINS, JR., et al., Protestants

OPINION ACCOMPANYING ORDER DISMISSING PROTEST

On May 4, 1945, George C. Collins, Jr. and Christine Collins, of Glenview, Kentucky, and A. J. Cummins, Yancey Lee Cummins, and Edward J. Miller of Louisville, Kentucky filed a protest against provisions of the General Maximum Price Regulation and of Maximum Price Regulation No. 193.

All of the Protestants were stockholders of the Cummins Distilleries Corporation. In addition, Protestant A. J. Cummins was a director of the corporation. During the period from August 27, 1933 to December 31, 1942 the Cummins Distilleries Corporation was engaged in the business of distilling whiskey and gin.

The corporation sold whiskey in bulk and whiskey and gin in cases. It also stored whiskey in bonded warehouses, on which warehouse receipts were issued. On December 31, 1942 the Cummins Distilleries Corporation was dissolved. In the course of liquidation these warehouse receipts were distributed to the Corporation's stockholders including Protestants. Protestants allege that these warehouse receipts were sold on behalf of the stockholders

during January 1943, the last sale being made about January 9, 1943.

On May 27, 1943 two treble damage actions were commenced in the United States District Court for the Western District of Kentucky against Protestants and others. One action was directed against all of the Protestants and others as stockholders of the Cummins Distilleries Cor- [fol. 26] poration and was based upon the sale of the previously described warehouse receipts for bulk whiskey subsequent to the dissolution of the Corporation at prices in excess of the maximum price for whiskey established by Maximum Price Regulation No. 193. The other action was directed against Protestant A. J. Cummins and others as officers and directors of the Corporation and was based upon sales of bulk whiskey and whiskey and gin in cases made prior to the dissolution of the Corporation. It was alleged in this proceeding, that certain sales made prior to August 5, 1942, were in violation of provisions of the General Maximum Price Regulation and that sales made after August 5, 1942 violated provisions of Maximum Price Regulation No. 193. These actions are pending at the present time.

Prior to August 5, 1942, sales of intoxicating liquors including whiskey and gin, were subject to the provisions of the General Maximum Price Regulation. Maximum Price Regulation No. 193, which was effective on August 5, 1942, superseded the General Maximum Price Regulation with respect to sales of domestic distilled spirits, including whiskey and gin sold in cases and bulk whiskey. With certain exceptions, Maximum Price Regulation No. 193 continued the pricing method of a March 1942 freeze applied by the General Maximum Price Regulation. Maximum Price Regulation No. 445, effective on August 14, 1943, established specific dollars-and-cents maximum prices for sales of domestic distilled spirits and wines, including whiskey and gin, superseding Maximum Price Regulation No. 193.

It appears that Protestants' sole interest in attacking provisions of the General Maximum Price Regulation and of Maximum Price Regulation No. 193 arises out of enforcement proceedings pending against them. They have set forth no objections to Maximum Price Regulation No. 445, the Regulation applicable to sales of whiskey and gin at the time the protest was filed.

[fol. 27] The price Administrator does not regard this attempt to question the validity of a maximum price regulation rescinded prior to the filing of the protest as a proper use of the protest procedure. See *Thomas Paper Stock Company v. Bowles*, No. 159 (E. C. A., March 27, 1945); *Chas. A. Krause Milling Company v. Bowles*, (E. C. A., April 12, 1945). It does not appear that at the time the protest was filed Maximum Price Regulation No. 193 or the General Maximum Price Regulation against which the protest is directed either required or prohibited action by the Protestants. Hence, the protest failed to comply with the limitation in Section 203(a) of the Emergency Price Control Act that a person may file a protest against a provision of a regulation only if he is "subject to" that provision. See *The Buka Coal Company v. Brown*, 133 F. (2d) 249 (E. C. A., 1943).

Moreover, the character of the proceeding which Protestants seek to institute is inconsistent with the general purpose and framework of the protest and review provisions of the Act. The fundamental purpose underlying the inclusion in the Emergency Price Control Act of these provisions was to provide for reexamination and proper modification of maximum price regulations in the light of the facts presented in the protest proceeding. Since Maximum Price Regulation No. 193 and the General Maximum Price Regulation have been superseded in their application to sales of whiskey and gin, this objective would not be served by consideration of this protest on the merits.

It appears that Protestants' sole interest in securing a determination that the General Maximum Price Regulation and Maximum Price Regulation No. 193 are invalid as applied to their sales is to interpose such a determination as a defense in enforcement proceedings pending against them. The appropriate procedures prescribed by Congress for such cases in which the sole issue is the liability of a defendant in an enforcement action are those [fol. 28] set forth in Section 204(e) of the Act, subject to the conditions and requirements there set forth.

To permit recourse to the protest procedure in cases such as this instead of the procedures provided in Section 204(e) would permit circumvention of the limitations expressly set forth in the Act upon retroactive determinations of the validity of maximum price regulations. Thus

Section 204(e) provides that a defendant in an enforcement action may secure leave to file a complaint with the Emergency Court of Appeals only with respect to objections found by the district court to be made in good faith and for which reasonable and substantial excuse exists for the defendant's failure to present such objections in a protest. Congress thereby clearly evidenced its intent not to open wide the door for attacks upon the past validity of regulations by those charged with their violation, but rather to preserve that privilege to those who can make the showing required under Section 204(e)(1). A substantial inroad would be made on this limitation if in cases such as this the protest proceedings could be used in lieu of the procedures prescribed by Section 204(e).

In addition, serious problems of administration are presented if the protest procedure can be used where only liability in an enforcement action is involved. Where, as in this case, the protest was filed after institution of the enforcement proceeding, Section 205(e)(2) of the Act provides that the pendency of the protest and review proceeding may not be grounds for staying the enforcement action.[1] As a result of this prohibition against granting stays in such cases the enforcement proceedings and exe- [fol. 29] cution of judgment could well be completed prior to the termination of the protest and review proceedings. Any determination that the regulation was invalid would therefore be rendered wholly futile.

It does not appear appropriate to the Price Administrator to consider Protestants' objections to the General Maximum Price Regulation and Maximum Price Regulation No. 193 as directed to Maximum Price Regulation No. 445. Altering the provisions of Maximum Price Regulation No. 445 would not provide the relief desired by Protestants; since any change in this Regulation would have no effect upon the enforcement proceeding pending against them. As already indicated, Protestants have not sought a determination with respect to the validity of Maximum Price Regulation No. 445, and Protestants' allegations as

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[1] The Price Administrator is advised that in this case Protestants requested a stay of the enforcement proceedings during pendency of the protest proceedings but that such request was denied by the District Court.

the manner in which they were subject to Maximum Price Regulation No. 193 and the General Maximum Price Regulation indicate that they had no further interest in sales of whiskey or gin after January 9, 1943, a date prior to the effective date of Maximum Price Regulation No. 345.

For the foregoing reasons, the protest should be dismissed.

Issued this 2 day of June, 1945.

(S.) Chester Bowles, Administrator.

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fol. 30] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 12, 1945. Herman C. Beasley, Clerk

In the United States Emergency Court of Appeals

No. 239

George C. Collins, Jr., et al.,

v.

Chester Bowles, Price Administrator

Objections to Granting of Motion to Dismiss

Now come Complainants, by their duly authorized attorneys, and pursuant to Rule 14 (b) of the Rules of this Court, object to the granting of the motion to dismiss the complaint for the following reasons:

1. The complaint states a claim upon which relief can and must be granted.

2. The protest which was dismissed by the Price Administrator was duly filed with him, as permitted by Section 203 (a) of the Emergency Price Control Act, as amended, and was erroneously dismissed by the Price Administrator.

3. In June 1943, the Price Administrator instituted a civil proceeding (now pending) in the United States District Court in Louisville, Kentucky to recover treble dam-
fol. 31] ages amounting to $6,799,101.51 against Complainants, alleging sales in excess of maximum ceiling prices

on bulk whiskey prescribed by the General Maximum Price Regulation and Maximum Price Regulation No. 193; if there is any liability for such alleged sales in violation of ceiling prices, it must be because Complainants were and are subject (for enforcement purposes) to the provisions of the two regulations and Section 203 (a) of the Emergency Price Control Act, as amended, authorizes the filing of a protest "at any time" after the issuance of a regulation by any person "subject" to any provision of such regulation.

4. It is absurd for the Price Administrator to contend that the Complainants are not "subject" to the provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 at a time when the Price Administrator is attempting to collect treble damages amounting to $6,799,101.51 against Complainants in a civil suit for alleged violations of ceiling prices prescribed by the regulations in question.

5. It is immaterial that General Maximum Price Regulation, as related to whiskey prices, and Maximum Price Regulation No. 193 were superseded by another regulation after the civil suit was filed in Kentucky by the Price Administrator against Complainants to collect treble damages for alleged violations of the two first mentioned regulations, because Complainants had the unqualified right under Section 203 (a) of the Emergency Price Control Act, as amended, to protest the regulations when their protest was filed with the Price Administrator on May 4, 1945.

[fol. 32] 6. In dismissing the protest, the Price Administrator flagrantly ignored the express provisions of Section 203 (c) of the Emergency Price Control Act, as amended, by failing to refer the protest, as requested by Complainants in their protest, to a board of review before denying same, in whole or in part, or in dismissing the protest.

7. On June 4, 1945, the Supreme Court of the United States granted a writ of certiorari in the case of *Thomas Paper Stock Company* v. *Bowles*, Docket 1206, to review the ruling of this Court that a protest may not be filed under Section 203 (a) covering past transactions where the regulation has been superseded before the protest was filed but enforcement proceedings were pending at the time

the protest was filed, and a decision by the Supreme Court will be controlling in the instant case.

8. The decisions of this Court in *Charles A. Krause Milling Co.* v. *Bowles*, 148 Fed. 2d 844 and *Eastern Wine Corporation* v. *Bowles* No. 213 decided May 17, 1945, are no longer authorities which support the motion to dismiss since a writ of certiorari was granted by the Supreme Court of the United States on June 4, 1945 in *Thomas Paper Stock Company* v. *Bowles*, Docket 1206.

9. Under the principle announced in *United States* v. *Hark*, 320 U. S. 531, a protest proceeding may be employed under Section 203 (a) of the Emergency Price Control Act, as amended, to secure determination as to the validity and [fol. 33] application of regulatory provisions which have been superseded prior to the filing of the protest, where enforcement proceedings are pending to collect treble damages under the superseded regulations when the protest is filed.

Respectfully submitted, John K. Skaggs, Kentucky Home Life Building, Louisville, Kentucky; Allen P. Dodd, Sr., Marion E. Taylor Building, Louisville, Kentucky; Max O'Rell Truitt, 1616 K Street Northwest, Washington, D. C., Attorneys for Complainants.

July 12, 1945.

[fol. 34] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 13, 1945. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 239

GEORGE C. COLLINS, et al.

v.

CHESTER BOWLES, Price Administrator

MEMORANDUM IN SUPPORT OF OBJECTIONS TO GRANTING OF MOTION TO DISMISS

On May 4, 1945, Complainants filed a protest with the Price Administrator objecting to the provisions of General

Maximum Price Regulation and Maximum Price Regulation No. 193. The protest was filed, as authorized by Section 203 (a) of the Emergency Price Control Act, which section provides that "*at any time* after the issuance of any regulation or order under Section 2, or in the case of a price schedule, *at any time* after the effective date thereof * * * any person *subject to* any provision of such regulation, order, [fol. 35] or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision * * *" (emphasis supplied).

At the time the protest was filed there was pending against protestants and others in the United States District Court at Louisville, Kentucky a civil proceeding (instituted in May 1943) to recover treble damages amounting to $6,799,101.51 for alleged sales in 1942 and 1943 of whiskey in excess of the maximum ceiling price prescribed by General Maximum Price Regulation and Maximum Price Regulation No. 193. Obviously, if there is any liability for such alleged sales in violation of ceiling price, it must be because Complainants *were and are* (for enforcement purposes) *subject to* the two regulations aforementioned. Hence, the protest was properly filed under Section 203 (a) which authorizes the filing of a protest "*at any time*" after the issuance of a regulation by any person *subject to* any provision of such regulation.

On June 2, 1945, the Price Administrator erroneously dismissed the protest for the stated reason that it did not comply with Section 203 (a) of the Emergency Price Control Act. In dismissing the protest, the Price Administrator ignored the express provisions of Section 203 (e) of [fol. 36] the Act by failing to refer the protest as requested by protestants in their protest, to a Board of Review before denying same, in whole or in part, or in dismissing the protest. Such action by the Price Administrator also ignored Sections 35 (b), 43 and 59 of Procedural Regulation No. 1 issued by him.

On June 22, 1945 Complainants duly filed their complaint with this Court, as authorized by Section 204 (a) of the Act, to review the erroneous action of the Price Administrator in dismissing their protest on procedural grounds by his order of June 2, 1945.

The Price Administrator has filed a motion to dismiss the complaint and in so doing relies upon prior decisions of this

Court in *Krause Milling Company* v. *Bowles*, 148 Fed. 2d 845 and *Eastern Wine Corporation* v. *Bowles*, No. 213, May 17, 1945. The Krause case was decided by this Court shortly after it decided *Thomas Paper Stock Company* v. *Bowles*, 148 Fed. 2d 831 and merely follows the decision in the Thomas case. The latter case is now before the Supreme Court of the United States, a writ of certiorari having been granted on June 4, 1945 (two days after the Price Administrator dismissed the protest in the pending case) under Docket No. 1206. A decision by the Supreme Court on the issue involved in the Thomas Paper Stock Company [fol. 37] case will be controlling upon the issue raised by the motion to dismiss now pending before this Court in the instant case. Therefore, it seems only fair that this Court should not sustain the motion to dismiss pending decision by the Supreme Court in the Thomas case since there is obviously grave doubt that the prior rulings of this Court have been correct.

Section 205 (e) of the Emergency Price Control Act authorized the Price Administrator to institute a civil action to collect treble damages against a person selling a commodity in excess of ceiling prices established by regulations of the Administrator and such a suit must be brought within one year from the date of the occurrence of the violation. In the instant matter, suit was instituted in the United States District Court at Louisville, Kentucky by the Administrator in May 1943 to recover $6,799,101.51 from Complainants and others for alleged sales in excess of ceiling prices on whiskey established by General Maximum Price Regulation and Maximum Price Regulation No. 193. Unless Complainants are now *subject to* the provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 within the meaning of Section 203 (a) of the Emergency Price Control Act granting the right to protest, it must follow that they are not now subject to the pro- [fol. 38] visions of Section 205 (e) imposing liability for treble damages and that the treble damage suit pending against them in Louisville, Kentucky must be dismissed because Complainants are no longer subject to the regulations relied upon by the Administrator in his suit, the regulations having been superseded by other regulations and no regulation now being applicable to alleged sales made by Complainants in 1942 and January 1943. Obviously, there

is no basis for a different interpretation of Section 203 (a) than of Section 205 (e). In other words, Complainants cannot be considered on one hand as *subject to* General Maximum Price Regulation and Maximum Price Regulation No. 193 for purpose of liability for treble damages and, on the other hand, be treated as not subject to the same regulations for purpose of filing a protest under Section 203 (a).

The unqualified rights of Complainants to file a protest with the Price Administrator under Section 203 (a) and to appeal from his decision thereon to this Court by filing a complaint under Section 204 (a) are in no way abridged by the provisions of Section 204 (e). The latter Section merely gives Complainants a possible, additional protection by permitting the filing of a complaint with this Court upon leave obtained from the District Court within five days after judgment in a civil suit. This cumulative remedy is provisional upon the action of the District Court and it [fol. 39] does not give a party an unqualified right to file a complaint with this Court. In its prior decisions relied upon by the Price Administrator in his memorandum, this Court has been guilty of judicial legislation in limiting the unconditional rights of Complainants to file protest under Section 203 (a). It is believed that the Supreme Court of the United States will correct the errors of this Court in its decision upon review of the Thomas Paper Stock Company case, Docket No. 1206. As the dissenting opinion of Justice Laws so forcefuly points out in the Thomas case, the prior opinions of this Court limiting the right of protest under Section 203 (a) are erroneous and in direct violation of the clear wording of the statute.

Under the principle announced in *United States* v. *Hark*, 320 U. S., 531, 536, a protest may be employed under Section 203 (a) of the Emergency Price Control Act to secure a determination as to the validity and application of regulatory provisions, which have been superseded prior to the filing of the protest, where an enforcement action for treble damages is pending, based upon the superseded regulations, at the time the protest is filed. Revocation of the regulations in the instant case did not repeal Sections 203 (a) and 204 (a) of the Act. The statute—not the regulations—creates the right to protest and to appeal by complaint to this [fol. 40] Court from an adverse ruling of the Price Administrator on a protest.

No question of staying the enforcement action pending in Louisville, Kentucky is involved in the instant complaint. The interpretation of Section 205 (c) (2) of the Act is not in issue. The Price Administrator in his opinion dismissing the protest states that:

> "• • • the enforcement proceedings and execution of judgment could well be completed prior to the termination of the protest and review proceedings. Any determination that the regulation was invalid would therefore be rendered wholly futile. • • •"

This reasoning is absurd on its face, and nothing more than a weak excuse advanced by the Price Administrator for neglecting his duty to promptly decide the protest on its merits. Less speculation by the Price Administrator and more attention to the performance of his duty to decide protests promptly would be helpful. As a matter of fact, trial of the enforcement proceedings has already been postponed until October. Complainants are entitled to have their protest decided promptly. If their contentions are sound, a decision of the Price Administrator, or of this Court, holding the provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 inapplicable to, and that the regulations prescribed no ceiling prices on, sales of warehouse receipts made by Complain- [fol. 41] ants will enable the latter to introduce the ruling in evidence as a complete defense at the trial in the enforcement suit.

Summary of Argument

Under Section 204 (d) of the Emergency Price Control Act *only* the Emergency Court of Appeals may decide the legality of price regulations issued by the Price Administrator. If a party may not file a protest to question the legality of price regulations which have been superseded but which superseded regulations are the basis of a claim for treble damages, as in the pending matter, then, should the District Court after judgment and upon application under Section 204 (e) (1) *not* permit the filing of a complaint with the Emergency Court the result will be that the party is deprived of *all right* to have the validity of the regulations contested in the only Court having jurisdiction to decide the question. Obviously, such a result was not intended by the Congress in enacting Section 204 (e) (1)

which merely gives to a party cumulative, possible, additional means of protection and does not expressly, or by [fol. 42] implication, repeal the absolute right to protest granted by Section 203 (a).

This Court should not by judicial legislation take away from a party his unqualified statutory right to protest the validity of regulations under Section 203 (a) merely because a possible—not an absolute—right is given to the party to file a complaint before the Emergency Court after judgment but which possible right is subject to the absolute discretion of the District Court. Otherwise, Section 204 (e) (1) instead of providing an additional cumulative means of protection may have the effect of wholly depriving a party of any right to have the Emergency Court pass upon the validity of regulations.

It need not of course be argued that no claims by the Price Administrator of mere administrative inconvenience can possibly justify the deprivation by this Court, through a strained construction of Section 204 (e) (1), of the absolute right to protest the validity of regulations under Section 203 (a).

Conclusion

The motion to dismiss the complaint should be overruled [fol. 43] and the complaint should be decided upon its merits. In the alternative, the matter should be returned to the Price Administrator with instructions to refer the protest to a Board of Review under the mandatory requirement of Section 203 (c) of the Emergency Price Control Act.

Respectfully submitted, John K. Skaggs, Kentucky Home Life Building, Louisville, Kentucky; Allen P. Dodd, Sr., Marion E. Taylor Building, Louisville, Kentucky; Max O'Rell Truitt, 1616-K Street, Northwest, Washington, D. C., Attorneys for Complainants.

[fol. 44] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 17, 1945. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 239

GEORGE C. COLLINS, ET AL.,

v.

CHESTER BOWLES, Price Administrator

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF OBJECTIONS TO GRANTING OF MOTION TO DISMISS

Maximum Price Regulation 445 became effective August 14, 1943, or over seven months after Complainants sold warehouse receipts, covering bulk whiskey, in January 1943. Obviously, the prices prescribed by MPR 445 could not apply to actual sales and deliveries made seven months before its issuance.

Section 2.1 (b) of MPR 445 provides that MPR 445 supersedes General Maximum Price Regulation and MPR 193 [fol. 45] "except as otherwise provided in this regulation". The exception is contained in Section 7.4a of MPR 445 which provides:

> "Maximum prices for sellers for whom no specific provision is made. The maximum price for any seller of distilled spirits or wine for whom no maximum price is provided in this regulation and who is otherwise unable to determine a maximum price hereunder, shall be his maximum price established by whichever of the following regulations of the Office of Price Administration is applicable: Maximum Price Regulation 193; General Maximum Price Regulation; National Regional or District Restaurant Maximum Price Regulations."

In other words, Section 7.4a of MPR 445 expressly continued in effect General Maximum Price Regulation and MPR 193 to provide maximum prices for any seller for whom no maximum price was provided in MPR 445. Clearly, General Maximum Price Regulation and MPR 193 were continued in effect to include such sellers as Com-

plainants in the instant matter because their sales of warehouse receipts were made seven months before MPR 445 became effective. It seems odd that counsel for the Price Administrator should contend that the earlier regulations aforementioned have been superseded by MPR 445 in so far as their effect upon the instant matter is concerned.

[fol. 46] Since General Maximum Price Regulation and MPR 193 were expressly continued in effect by Section 7.4a of MPR 445, it is obvious that Complainants were, "subject to" the former two regulations when their protest was filed with the Price Administrator on May 4, 1945. Hence, the principle (believed to be erroneous) announced by this Court in *Thomas Paper Stock* v. *Bowles* 148 Fed. 2d 831; *Krause Milling Co.* v. *Bowles* 148 Fed. 2d 845 and *Eastern Wine Corporation* v. *Bowles*, No. 213 May 17, 1945 can have no application to the facts of the pending case. Being "subject to" General Maximum Price Regulation and MPR 193 on May 4, 1945 in relation to sales made in January 1943, it is clear that Complainants had the unqualified right under Section 203 (a) of the Act to protest these regulations before the Price Administrator and to appeal from his dismissal of their protest by filing a complaint with this Court under Section 204 (a).

[fol. 47] Conclusion

The motion to dismiss the complaint should be overruled and the complaint should be decided upon its merits.

Respectfully submitted, John K. Skaggs, Kentucky Home Life Building, Louisville, Kentucky; Allen P. Dodd, Sr., Marion E. Taylor Building, Louisville, Kentucky; Max O'Rell Truitt, 1616 K Street, Northwest, Washington, D. C., Attorneys for Complainants.

[fol. 48] [Stamp:] United States Emergency Court of Appeals. Filed Aug. 9, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 239

GEORGE C. COLLINS, JR., et al.

v.

CHESTER BOWLES, Price Administrator

Present: Maris, C. J., and Magruder, McAllister, Lindley and Laws, JJ.

JUDGMENT

Upon consideration of Respondent's motion to dismiss the complaint and of Complainants' objections thereto and memorandum and supplemental memorandum in support of objections, and the Court being of opinion that it is without jurisdiction to entertain the complaint,

It is ordered and adjudged that the complaint herein be, and it hereby is, dismissed.

It is further ordered that the clerk of this Court transmit forthwith a certified copy of this judgment to the Price Administrator.

Dated August 9, 1945.

By the Court.

Teste: Herman C. Beasley, Clerk.

[fol. 49] UNITED STATES EMERGENCY COURT OF APPEALS

I, Herman C. Beasley, Clerk of the United States Emergency Court of Appeals, hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 48, both inclusive, constitute a true copy of

(1) Complaint
(2) Respondent's motion to dismiss Complaint and memorandum in support thereof
(3) Proceedings in the United States Emergency Court of Appeals

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in the case of: No. 239, George C. Collins, Jr., et al., v. Chester Bowles, Price Administrator, as the same remain upon the files and records of said United States Emergency Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Emergency Court of Appeals, at the City of Washington, this 20th day of August, A. D. 1945.

Herman C. Beasley, Clerk, United States Emergency Court of Appeals, by J. Fredrick Mattingley, Chief Deputy Clerk. (Seal.)

[fol. 50] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 5, 1945

The petition herein for a writ of certiorari to the United States Emergency Court of Appeals is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 21 1945
CHARLES ELMORE CROPLEY
CLERK

No. 393

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

CHRISTINE COLLINS, A. J. CUMMINS, YANCEY LEE CUMMINS AND EDWARD J. MILLER,

Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

JOHN K. SKAGGS,
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PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.

CHRISTINE COLLINS, A. J. CUMMINS, YANCEY LEE CUMMINS AND EDWARD J. MILLER,

Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

Petitioners, Christine Collins, A. J. Cummins, Yancey Lee Cummins and Edward J. Miller, pray that a writ of certiorari issue to review a judgment of the United States Emergency Court of Appeals dismissing their complaint filed to review the action of respondent in dismissing their protest on procedural grounds.

Opinion Below.

No opinion was rendered by the United States Emergency Court of Appeals.

1f

Jurisdiction

The judgment of the United States Emergency Court of Appeals sought to be reviewed was entered August 9, 1945 (R. 36). Jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App., Supp. IV, Sec. 901, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2nd Sess., and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess., making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. Sec. 347).

Questions Presented

1. Whether Section 203(a) of the Emergency Price Control Act, as amended, authorizes the filing of a protest by petitioners with respondent on May 4, 1945, to contest the applicability and validity of the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 with respect to sales by petitioners in January, 1943, of warehouse receipts for whiskey.

2. Whether Section 204(a) of the Emergency Price Control Act, as amended, authorizes the filing of a complaint by petitioners with the United States Emergency Court of Appeals to review the action of respondent in dismissing, on procedural grounds, their protest contesting the applicability and validity of the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 with respect to sales by petitioners in January 1943 of warehouse receipts of whiskey.

3. Whether Section 204(e)(1) of the Emergency Price Control Act, as amended, by implication limited the unqualified right of petitioners under Section 203(a) of the Act to protest the applicability and validity of pricing

provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 merely because a possible—not an absolute—right is given petitioners under Section 204(e)(1) of the Act to file a complaint with the United States Emergency Court of Appeals within five days after judgment against them in a pending civil action, but which possible right is subject to the absolute discretion of the United States District Court.

4. Whether Maximum Price Regulation No. 445, which became effective August 14, 1943, superseded the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 with respect to sales of warehouse receipts for whiskey by petitioners in January 1943, or over seven months *before* Maximum Price Regulation No. 445 became effective.

5. Whether, when penalties are sought to be enforced against petitioners in a civil enforcement action for alleged violations of superseded price regulations, petitioners have the right to contest the applicability and validity of the superseded price regulations by filing a protest with respondent under Section 203(a) of the Emergency Price Control Act, as amended, and thereafter by filing a complaint with the United States Emergency Court of Appeals under Section 204(a) of the Act to review the action of respondent on the protest.

Statutes and Regulations Involved

The pertinent provisions of the Emergency Price Control Act, as amended, and of Procedural Regulation No. 1 issued by respondent appear in the Appendix, *infra*, pp. 18-25. The Maximum Price Regulations involved in this proceeding are: General Maximum Price Regulation, 7 Fed. Reg. 3153; Maximum Price Regulation No. 193, 7 Fed. Reg.

6006, and Maximum Price Regulation No. 445, 8 Fed. Reg. 11161.

Statement

In June, 1943 respondent instituted against petitioners and others in the United States District Court for the Western District of Kentucky a civil action to recover treble damages amounting to $6,799,101.51 for alleged sales in 1942 and 1943 of whiskey at prices in excess of the maximum ceiling prices prescribed by General Maximum Price Regulation and Maximum Price Regulation No. 193 (R. 15-16, 23). The civil action was begun under authority of Section 205(e) of the Emergency Price Control Act and is still awaiting trial. Petitioners were stockholders in the Cummins Distilleries Corporation and received warehouse receipts covering bulk whiskey upon the dissolution of the Corporation in December, 1942 (R. 22). These warehouse receipts devolved upon petitioners by operation of law and were sold by them between January 4 and 9, 1943, upon the belief that they were "securities" expressly exempt from the pricing provisions of General Maximum Price Regulation and not covered by Maximum Price Regulation No. 193 as in effect during January 1943.

On May 4, 1945, petitioners filed their protest with respondent, objecting to the applicability and validity of the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 with respect to sales by petitioners of warehouse receipts for whiskey in January 1943 (R. 2, 21). The protest was filed under authority of Section 203(a) of the Emergency Price Control Act. On June 2, 1945, respondent dismissed the protest for the stated reason that it did not comply with Section 203(a) of the Act (R. 22), and in so doing ignored the express provisions of Section 203(c) of the Act by failing to refer the protest, as requested by petitioners

in their protest (R. 2), to a Board of Review before denying same. Such action by respondent also ignored Sections 35(b), 43 and 50 of Procedural Regulation No. 1 issued by him (Infra, pp. 24-25).

On June 22, 1945, petitioners duly filed their complaint with the Emergency Court of Appeals, as authorized by Section 204(a) of the Act, to review the action of respondent in dismissing their protest (R. 1-19). Respondent filed a motion to dismiss the complaint on the sole ground that "said complaint fails to state a claim upon which relief can be granted" (R. 20). On August 9, 1945, the Emergency Court of Appeals entered an order dismissing the complaint but filed no opinion or made any statement of the reasons for its action other than to state that it was "without jurisdiction to entertain the complaint" (R. 36).

Specifications of Error to Be Urged

The United States Emergency Court of Appeals erred:

1. In dismissing the complaint filed by petitioners under Section 204(a) of the Emergency Price Control Act, as amended, to review the prior action of respondent in dismissing their protest on procedural grounds.

2. In failing to hold that petitioners had the unqualified statutory right under Section 203(a) of the Emergency Price Control Act to file a protest in May, 1945 attacking the applicability and validity of pricing provisions in General Maximum Price Regulation and Maximum Price Regulation No. 193, which respondent was and is seeking to enforce against petitioners in a civil enforcement action for treble damages now pending in the United States District Court for the Western District of Kentucky.

3. In failing to hold that petitioners had the unqualified statutory right under Section 204(a) of the Emergency

Price Control Act, as amended, to file their complaint with the United States Emergency Court of Appeals to review the action of respondent in dismissing their protest duly filed with respondent under authority of Section 203(a) of the Act aforementioned.

4. In failing to hold that respondent violated the mandatory provision of Section 203(c) of the Emergency Price Control Act by omitting to comply with their request that their protest be referred to a Board of Review.

5. In failing to hold that Section 204(e)(1) of the Emergency Price Control Act, as amended, does not limit the unqualified statutory right of petitioners to protest the applicability and validity of the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 with respect to sales of warehouse receipts for whiskey by petitioners in January, 1943, and does not expressly, or by implication, repeal the absolute right to protest granted petitioners by Section 203(a) of the Act.

6. In failing to hold that no claim by respondent of mere administrative inconvenience can justify the deprivation by the Court, through a strained construction of Section 204(e)(1) of the Emergency Price Control Act, of the absolute right of petitioners to protest the validity of pricing regulations under Section 203(a) of the Act and to have dismissal of their protest reviewed by filing a complaint with the Emergency Court of Appeals under Section 204(a) of the Act.

7. In failing to grant the relief sought by petitioners in their complaint.

8. In holding that the Court was "without jurisdiction to entertain the complaint"

Reasons for Granting the Writ

The questions raised by this petition are matters of great public importance involving primarily the interpretation of Sections 203(a) and 204(a) of the Emergency Price Control Act, as amended. These statutory procedural provisions—never before construed by this Court—affect the constitutional rights of all parties subject to the more than 500 maximum pricing regulations issued under the Emergency Price Control Act, as amended. The interpretations of Sections 203(a) and 204(a) by respondent and the Emergency Court of Appeals are in direct conflict with the plain wording of the statute, are in conflict with the principle announced in *United States* v. *Hark*, 320 U. S. 531, 536, and deprive the public of that protection which the Congress sought to provide in clear language. The several issues involved in the instant matter are of far more extensive scope than is the issue involved in *Thomas Paper Stock Co.* v. *Bowles*, Docket No. 1206, in which a writ of certiorari was granted on June 4, 1945.

1. *Section 203(a) of the Emergency Price Control Act grants to a party the unconditional right to protest "at any time" the legality of a maximum price regulation to which he is "subject".* The protest was filed as authorized by Section 203(a) of the Emergency Price Control Act, which section provides that

> "*At any time* after the issuance of any regulation or order under section 2, or in the case of a price schedule, *at any time* after the effective date thereof * * * any person *subject to* any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision * * *" (Emphasis supplied).

At the time the protest was filed in May, 1945, there was (and now is) pending against petitioners and others, in the United States District Court for the Western District of Kentucky, a civil action instituted in June, 1943 by respondent to recover treble damages amounting to $6,799,101.51 for alleged sales in 1942 and 1943 of whiskey at prices in excess of the maximum ceiling prices prescribed by General Maximum Price Regulation and Maximum Price Regulation No. 193. Obviously, if there is any liability on the part of petitioners for such alleged sales in violation of maximum ceiling prices, it must be because petitioners *were and are* "subject to" the two regulations aforementioned. Hence the protest was properly filed under Section 203(a) of the Act which authorizes the filing of a protest "at any time" after the issuance of a regulation by any person "subject to" any provision of such regulation.

2. *In dismissing the protest respondent ignored the mandatory provision of Section 203(c) of the Emergency Price Control Act, as well as his own regulations.*—In dismissing the protest respondent ignored the mandatory provision of Section 203(c) of the Act by failing to refer the protest, as requested by petitioners in their protest (R. 2), to a Board of Review before denying same. Such action by respondent also ignored sections 35(b), 43 and 50 of Proceedural Regulation No. 1 issued by him (Infra, pp. 24-25).

3. *Section 204(a) of the Emergency Price Control Act grants to a party the unqualified right to have the dismissal of a protest reviewed by the Emergency Court of Appeals.*—The language of Section 204(a) is free from any ambiguity. It gives petitioners an unqualified right to file a complaint to review the denial of their protest. Respondent filed a motion to dismiss the complaint in the Emergency Court of Appeals and in his memorandum in support of the motion relied upon prior decisions of the Emergency Court of Ap-

peals in *Krause Milling Company* v. *Bowles*, 148 F. 2d 845 and *Eastern Wine Corporation* v. *Bowles*, No. 213, May 17, 1945. The Krause case was decided by the Emergency Court of Appeals shortly after its decision in *Thomas Paper Stock Company* v. *Bowles*, 148 F. 2d 831 and merely follows the decision in the Thomas case. The latter case is now before this Court, a writ of certiorari having been granted on June 4, 1945, or two days after the respondent dismissed the protest in the instant matter. To say the least, there is obviously grave doubt that the prior rulings of the Emergency Court of Appeals have been correct.

4. *Respondent may not maintain the pending civil action against petitioners under Section 205(e) of the Emergency Price Control Act unless petitioners are "subject to" the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193.*—Section 205(e) of the Act authorizes respondent to institute a civil action, such as is *now pending* against petitioners, to collect treble damages against a person selling a commodity at a price in excess of maximum ceiling prices established by regulations of respondent, and such a suit must be brought within one year from the date of the occurrence of the violation. In the instant matter, action was instituted by respondent in the United States District Court for the Western District of Kentucky in June, 1943, to recover $6,799,101.51 from petitioners and others for alleged sales at prices in excess of maximum ceiling prices on whiskey established by General Maximum Price Regulation and Maximum Price Regulation No. 193. Unless petitioners are now "subject to" the provisions of the two price regulations aforementioned, within the meaning of Section 203(a) of the Act granting the right to protest, it must follow that they are *not* now "subject to" the provisions of Section 205(e) of the Act imposing liability for treble damages and that the

treble damage action pending against petitioners in Kentucky must be dismissed because petitioners are no longer subject to the regulations relied upon by respondent in his enforcement action. Obviously, there is no basis for an interpretation of Section 203(a) different from that of Section 205(e). In other words, petitioners cannot on one hand be considered as *subject to* the pricing provisions of General Maximum Price Regulation No. 193 for the purpose of liability for treble damages and, on the other hand, be treated as *not subject to* the same regulations for the purpose of filing a protest under Section 203(a) and having adverse action thereon reviewed by the Emergency Court of Appeals under Section 204(a) of the Act.

5. *Rights granted the public under Sections 203(a) and 204(a) of the Emergency Price Control Act are not limited by Section 204(e)(1) of that Act.*—The unqualified rights of petitioners to file a protest with respondent under Section 203(a) of the Act and to appeal from his decision thereon to the Emergency Court of Appeals by filing a complaint under Section 204(a) are in no way abridged by the provisions of Section 204(e) of the same Act. The latter section merely gives petitioners a possible, additional protection by permitting the filing of a complaint with the Emergency Court of Appeals upon leave obtained from the United States District Court within five days after judgment against them in the pending civil action. This cumulative remedy is conditional and in the discretion of the District Court since Section 204(e) does not bestow upon a party an unqualified right to file a complaint with the Emergency Court of Appeals. In its prior decisions relied upon by respondent, the Emergency Court of Appeals has been guilty of judicial legislation in limiting the unconditional right of parties to file a protest under Section 203(a) and to have adverse action thereon reviewed by complaint filed under Section 204(a). It is believed that this Court

will correct the prior errors of the Emergency Court of Appeals in its decision upon review of the Thomas Paper Stock case, Docket No. 1206. As the dissenting opinion of Justice Laws in the Thomas case so forcefully points out, the prior opinions of the Emergency Court, limiting the right of protest under Section 203(a) and review of adverse rulings under Section 204(a), are erroneous and in direct violation of the clear wording of the statute.

6. *The suspension of a maximum pricing regulation does not repeal the statutory rights granted the public by Section 203(a) and 204(a) of the Emergency Price Control Act.*— Under the principle announced in *United States* v. *Hark*, 320 U. S. 531, 536, a protest may be employed under Section 203(a) of the Emergency Price Control Act to secure a determination as to the applicability and validity of maximum pricing regulations, which have been superseded prior to the filing of a protest, where an enforcement action for treble damages is pending, based upon the superseded regulations, at the time the protest is filed. Suspension or revocation of the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 136, as contended by respondent, would not repeal Sections 203(a) and 204(a) of the Act. The statute, not the regulations issued by respondent, creates the right to protest and to review an adverse ruling thereon by complaint to the Emergency Court of Appeals.

Since the Act, Section 205(e), creates liability for penalties upon violation of maximum pricing regulations, *Cummins Distilleries Corporation* v. *Brown*, 56 F. Supp. 941, and enforcement of such liability after repeal of a pricing regulation is permitted under *United States* v. *Hark*, *supra*,[1]

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[1] See Rev. Stat., sec. 13, as amended by Act of March 22, 1944, c. 123, 58 Stat. 118 (1 U. S. C., Supp. IV, sec. 29) permitting prosecutions after the lapse of a temporary statute (such as the Emergency Price Control Act) for offenses committed prior to its expiration.

it must follow that Section 203(a) of the same Act permits protest of the applicability and validity of the repealed pricing regulations and that Section 204(a) permits filing of a complaint with the Emergency Court of Appeals to review the action of respondent upon a protest when an enforcement action is instituted, as in the instant matter, to collect penalties under the Act.

On April 2, 1943, respondent issued Supplementary Order No. 40. This order provides (8 Fed. Reg. 4325):

> 1335.54. *Effect of repeal, revocation, amendment or other modification of price regulations.* (a) The repeal, revocation, amendment or other modification of a price regulation or any part thereof shall not have the effect to release or extinguish any penalty or liability incurred under such price regulation unless otherwise expressly provided but such price regulation or part thereof shall be treated as remaining in force for the purpose of allowing or sustaining any proper suit, action, prosecution or proceeding with respect to such penalty or liability.

Assuming, but not conceding, the power of respondent to issue the above order, which power is denied in *United States* v. *Johnson*, 53 F. Supp. 167, it must follow that if repealed regulations may be treated "as remaining in force for the purpose of allowing or sustaining any proper suit, action, prosecution or proceeding with respect to such penalty or liability," then, for there to be any semblance of due process under the Fifth Amendment parties against whom a civil action for penalties is instituted must have the rights of protection granted them, by Sections 203(a) and 204(a) of the Emergency Price Control Act, to protest the applicability and validity of the regulations and to have the Emergency Court review the ruling of respondent upon the protest, since the Emergency Court *alone* is vested with

jurisdiction to determine the validity of maximum pricing regulations.

7. *The proceeding does not involve any question of staying the enforcement action now pending in the United States District Court for the Western District of Kentucky.*—No question of staying the enforcement action pending against petitioners in the Western District of Kentucky is involved in the instant matter. The interpretation of Section 205(e)(2) of the Act is not in issue. Respondent in his opinion dismissing the protest states that

> "* * * the enforcement proceedings and execution of judgment could well be completed prior to the termination of the protest and review proceedings. Any determination that the regulation was invalid would therefore be rendered wholly futile * * *" (R. 25).

This reasoning is absurd on its face and nothing more than a weak excuse advanced by respondent for neglecting his duty promptly to decide the protest on its merits. Less speculation by respondent and more attention to the performance of his duty promptly to decide protests would be more helpful to the public. As a matter of fact, trial of the enforcement action in Kentucky has been postponed until fall. Petitioners are entitled to have their protest decided promptly. If their contentions are sound, a decision of respondent or of the Emergency Court of Appeals holding the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 inapplicable to, and that the regulations prescribed no ceiling prices on, sales of warehouse receipts by petitioners in January 1943 will enable the latter to introduce the ruling in evidence as a complete defense at the trial in the enforcement action.

8. *The action of the Emergency Court of Appeals conflicts with the Congressional intent in enacting Section 204(d)*

of the Emergency Price Control Act.—Under Section 204(d) of the Emergency Price Control Act, as amended, *only* the Emergency Court of Appeals may decide the legality of pricing regulations issued by respondent. If parties may not (a) file a protest to question the legality of pricing regulations which have been superseded but which superseded regulations are the basis of a claim for treble damages as in the instant matter and (b) have action on their protest reviewed by the Emergency Court of Appeals, then, should the District Court after judgment against defendants and upon application by defendants under Section 204(e)(1) of the Act *not* permit the filing of a complaint with the Emergency Court of Appeals, the result will be that the parties are deprived of *all* right to have the validity of the regulations contested in the *only court* having jurisdiction to decide the question. Certainly such a result was not intended by the Congress in enacting Sections 204(d) and 204(e)(1), the latter of which sections merely gives to a party a cumulative, additional means of protection and does not expressly, or by implication, repeal the absolute rights to protest, and have adverse action thereon reviewed by the Emergency Court of Appeals, granted by Sections 203(a) and 204(a) of the Act.

It is of the utmost importance to the public that this Court not permit the Emergency Court of Appeals, under the guise of judicial legislation, to deprive parties of their unqualified statutory rights (a) to protest the applicability and validity of maximum pricing regulations under Section 203(a) and (b), to have action on the protest reviewed by the Emergency Court of Appeals under Section 204(a) merely because a possible—not an absolute—right is given the parties under Section 204(e)(1) to file a complaint before the Emergency Court of Appeals after judgment in a civil enforcement action, but which possible right is subject to the absolute discretion of the District Court.

Otherwise, Section 204(e)(1) instead of providing an additional, cumulative means of protection may have the effect of wholly depriving parties of any right whatsoever to protest pricing regulations or to have the Emergency Court of Appeals review adverse action by respondent with respect to the applicability and validity of such regulations.

No claim by the respondent of mere administrative inconvenience can possibly justify the deprivation by the Emergency Court of Appeals, through a strained construction of Section 204(e)(1), of the absolute rights of parties to protest, and have reviewed by the Emergency Court, issues with respect to the applicability and validity of regulations. These rights are given the parties by Sections 203(a) and 204(a) of the Act. Substantive rights may not be subordinated to administrative convenience.

9. *General Maximum Price Regulation and Maximum Price Regulation No. 193 were* not, *as to the sales in January, 1943 of warehouse receipts for whiskey, superseded by Maximum Price Regulation No. 445.*—Maximum Price Regulation No. 445 (8 Fed. Reg. 11161) became effective August 14, 1943, or over *seven months after* petitioners sold warehouse receipts covering bulk whiskey in January, 1943. Clearly, the maximum ceiling prices prescribed by M. P. R. 445 could not apply to actual sales and deliveries made seven months *before* its issuance.

Section 2.1(b) of M. P. R. 445 provides that M. P. R. 445 supersedes General Maximum Price Regulation and Maximum Price Regulation No. 193 "except as otherwise provided in this regulation". The exception is contained in Section 7.4a of M. P. R. 445 which provides:

> Maximum prices for sellers for whom no specific provision is made. The maximum price for any seller of distilled spirits or wine for whom no maximum price is provided in this regulation and who is other-

> wise unable to determine a maximum price hereunder, shall be his maximum price established by whichever of the following regulations of the Office of Price Administration is applicable: Maximum Price Regulation 193; General Maximum Price Regulation; National Regional or District Restaurant Maximum Price Regulations.

In other words, Section 7.4a of M. P. R. 445 expressly continued in effect General Maximum Price Regulation and Maximum Price Regulation No. 193 to provide maximum prices for any seller for whom no maximum ceiling price was provided in M. P. R. 445. Clearly, General Maximum Price Regulation and Maximum Price Regulation No. 193, if applicable, were continued in effect to include such sellers as petitioners in the instant matter because their sales of warehouse receipts for whiskey were made seven months *before* M. P. R. 445 became effective. Since General Maximum Price Regulation and Maximum Price Regulation No. 193, if applicable as contended by respondent in his pending treble damage action, were expressly continued in effect by Section 7.4a of M. P. R. 445, it is obvious that petitioners were "subject to" the former two regulations when their protest was filed with respondent on May 4, 1945. Hence, the principle (believed to be erroneous) announced by the Emergency Court of Appeals in *Thomas Paper Stock Company* v. *Bowles*, 148 F. 2d 831; *Krause Milling Co.* v. *Bowles*, 148 F. 2d 845; and *Eastern Wine Corporation* v. *Bowles*, No. 213, May 17, 1945 can have no application to the facts of the pending case. If "subject to" General Maximum Price Regulation and Maximum Price Regulation No. 193 on May 4, 1945, with respect to sales in January, 1943 of warehouse receipts for whiskey, it must follow that petitioners had the unqualified rights under Sections 203(a) and 204(a) of the Act to protest these regulations before respondent and

to appeal from his dismissal of their protest by filing a complaint with the Emergency Court of Appeals.

Conclusion

For these reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

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August, 1945.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess., are as follows:

Section 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the

limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

* * * * * * *

Sec. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximums prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act.

* * * * * * *

Sec. 203. (a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.

* * * * * * *

(e) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs: Provided, however, That, upon the request of the protestant, any protest filed in accordance with subsection (a) of this section after September 1, 1944, shall, before denial in whole or in part, be considered by a board of review consisting of one or more officers or employees of the Office of Price Administration, designated by the Administrator in accordance with regulations to be promulgated by him. Such regulations shall provide that the board of review may conduct hearings and hold sessions in the District of Columbia or any other place, as a board, or by subcommittees thereof, and shall provide that, upon the request of the protestants and upon a showing that material facts

would be adduced thereby, subpoenas shall issue to procure the evidence of persons, or the production of documents, or both. The Administrator shall cause to be presented to the board such evidence, including economic data, in the form of affidavits or otherwise, as he deems appropriate in support of the provision against which the protest is filed. The protestant shall be accorded an opportunity to present rebuttal evidence in writing and oral argument before the board and the board shall make written recommendations to the Price Administrator. The protestant shall be informed of the recommendations of the board and, in the event that the Administrator rejects such recommendations in whole or in part, shall be informed of the reasons for such rejection.

* * * * * * *

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding:

* * * * * * *

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be desig-

nated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Two judges shall constitute a quorum of the court and of each division thereof. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court

shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203(a). Upon the filing of a complaint pur-

suant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

Section 205. (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regula-

tion, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

* * * * * * *

Sections 35(b), 43 and 50 of Procedural Regulation No. 1 issued by respondent provide as follows:

Section 35(b) *Request for consideration by a board of review.* A protestant who wishes his protest considered by a board of review must specifically so request, indicating, if he wishes to offer oral argument, the order of his preference as to (1) argument before a board of review in Washington, D. C.; (2) argument before a subcommittee consisting of one member of a board at a location named by him. Section 45 of this revised procedural regulation sets forth the considerations which will be determinative in the decision as to where oral argument may be heard. The request for consideration by a board of review must be made either in the protest or in an amendment thereto filed within fifteen days of the date the protest is filed. Such an amendment shall be deemed filed within the fifteen day period if it is received by the Secretary, Office of Price Administration, Washington, D. C.,

or by the director of the appropriate territorial office, no later than the fifteenth day after the protest was filed. Further provisions with respect to proceedings before a board of review are to be found in sections 43 to 50, inclusive, of this regulation.

Section 43. *Right to consideration by a board of review.* Under section 203(c) of the Act, a protest filed after September 1, 1944 must, upon the protestant's request, be considered by a board of review before it can be denied in whole or in part. Consideration of the record in a protest proceeding by a board of review is undertaken for the purpose of reconsidering the provision or provisions of the maximum price regulation protested and recommending action relative thereto to the Administrator. A board of review considers the protest upon the basis of the record which has been developed in the proceedings. Protestant is accorded an opportunity to present oral argument to a board, upon the basis of the objections raised in the protest and the evidence in the record, and guided by the explanatory statement of the issues in the notice of consideration by a board of review. Section 34 of this revised procedural regulation explains the nature of the record in the proceedings. Section 35(b) explains the nature of such a request and states the time within which it must be filed.

Section 50. Action by Administrator after receipt of board of review's recommendations. After receipt of a board of review's recommendations as to the disposition of the protest, the Administrator shall, within a reasonable time, grant or deny the protest in whole or in part.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 393

CHRISTINE COLLINS, A. J. CUMMINS, YANCEY LEE CUMMINS AND EDWARD J. MILLER,

Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR

REPLY BY PETITIONERS TO MEMORANDUM FILED BY RESPONDENT

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SUPREME COURT OF THE UNITED STATES

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REPLY BY PETITIONERS TO MEMORANDUM FILED BY RESPONDENT

INSTANT PROCEEDING WILL NOT BE RENDERED MOOT IN ANY RESPECT BY DECISION OF EMERGENCY COURT OF APPEALS

Under Section 203(a) and (c) petitioners had the unqualified right to file their protest with respondent and he was under the mandatory duty to refer same to a Board of Review as requested in the protest, and as pro-

vided in Sections 35(b), 43 and 50 of Procedural Regulation No. 1. Petitioners have never had their protest considered by a Board of Review and respondent has never passed upon the merits of their protest. There can be no basis for depriving petitioners of their statutory rights.

Before any judgment was rendered in the *civil action*, still pending trial in Kentucky, petitioners did obtain an order of the District Court permitting them to file a complaint with the Emergency Court of Appeals and a complaint was thereafter filed covering some of the issues involved in the prior protest. Said complaint is now pending before the Emergency Court. Whether, under Section 204(e) of the Emergency Price Control Act, the District Court was authorized to issue its order until "after judgment" in that court is a question which has never been decided. Obviously, unless the District Court was authorized to issue its order "before" judgment in the civil action, the pending complaint in the Emergency Court of Appeals may be dismissed at any time for lack of jurisdiction.

At any rate, the complaint filed with the Emergency Court of Appeals upon authorization from the District Court acting under Section 204(e) cannot be any substitute for the unconditional rights of petitioners to have all the issues raised in their protest considered by a Board of Review and the merits thereof passed upon by respondent as provided for by Section 203(a) and (c). Should respondent hereafter decide the protest in favor of petitioners, a dismissal of the complaint in the Emergency Court of Appeals may well be in order. If respondent should decide the protest adversely to petitioners, they would have the right to file a complaint with the Emergency Court of Appeals and to have that court pass upon the merits of their protest based upon the evidence heretofore presented by petitioners to respondent in support of their protest.

Conclusion

It is respectfully submitted that the petition for writ of certiorari should be granted.

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September, 1945.

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Office Supreme Court, U.S.
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CHARLES ELMORE CROPLEY
CLERK

No. 393

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

CHRISTINE COLLINS, A. J. CUMMINS, YANCEY LEE CUMMINS AND EDWARD J. MILLER,
Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR PETITIONERS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 393

CHRISTINE COLLINS, A. J. CUMMINS, YANCEY LEE CUMMINS AND EDWARD J. MILLER,

Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR PETITIONERS

Opinion Below

No opinion was rendered by the United States Emergency Court of Appeals.

Jurisdiction

The judgment of the United States Emergency Court of Appeals was entered August 9, 1945 (R. 36). The petition for a writ of certiorari was filed August 31, 1945, and

was granted on November 5, 1945. Jurisdiction of this Court is conferred by Section 204(d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App. Supp. IV, Sec. 901, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2nd Sess., and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess., making applicable Section 240 of the Judicial Code, as amended (28 U. S. C., Sec. 347).

Questions Presented

1. Whether Section 203(a) of the Emergency Price Control Act, as amended, authorizes the filing of a protest by petitioners with respondent on May 4, 1945, to contest the applicability and validity of the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 with respect to sales by petitioners in January, 1943, of warehouse receipts for bulk whiskey.

2. Whether Section 204(a) of the Emergency Price Control Act, as amended, authorizes the filing of a complaint by petitioners with the United States Emergency Court of Appeals to review the action of respondent in dismissing, on procedural grounds, their protest contesting the applicability and validity of the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 with respect to sales by petitioners in January, 1943, of warehouse receipts for bulk whiskey.

3. Whether Section 204(e)(1) of the Emergency Price Control Act, as amended, by implication limited the unqualified right of petitioners under Section 203(a) of the Act to protest the applicability and validity of pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 merely because a possible—not an absolute—right is given petitioners under Section 204(e)(1)

of the Act to file a complaint with the United States Emergency Court of Appeals within five days after judgment against them in a pending civil action, but which possible right is subject to the absolute discretion of the United States District Court.

4. Whether Maximum Price Regulation No. 445, which became effective August 14, 1943, superseded the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 with respect to sales of warehouse receipts for bulk whiskey by petitioners in January, 1943, or over seven months *before* Maximum Price Regulation No. 445 became effective.

5. Whether, when penalties are sought to be enforced against petitioners in a civil enforcement action for alleged violations of superseded price regulations, petitioners have the right to contest the applicability and validity of the superseded price regulations by filing a protest with respondent under Section 203(a) of the Emergency Price Control Act, as amended, and thereafter by filing a complaint with the United States Emergency Court of Appeals under Section 204 (a) of the Act to review the action of respondent on the protest.

Statutes and Regulations Involved

The pertinent provisions of the Emergency Price Control Act, as amended, and of Procedural Regulation No. 1 issued by respondent appear in the Appendix, *infra*, p. 20. The Maximum Price Regulations involved in this proceeding are: General Maximum Price Regulation, 7 Fed. Reg. 3153; Maximum Price Regulation No. 193, 7 Fed. Reg. 6006, and Maximum Price Regulation No. 445, 8 Fed. Reg. 11161.

Statement

In June, 1943, respondent instituted against petitioners and others in the United States District Court for the Western District of Kentucky a civil action to recover treble damages amounting to $6,799,101.51 for alleged sales in 1942 and 1943 of whiskey at prices in excess of the maximum ceiling prices prescribed by General Maximum Price Regulation and Maximum Price Regulation No. 193 (R. 15-16, 23). The civil action was begun under authority of Section 205(e) of the Emergency Price Control Act and is still awaiting trial. Petitioners were stockholders in the Cummins Distilleries Corporation and received warehouse receipts covering bulk whiskey upon the dissolution of the Corporation in December, 1942 (R. 22). These warehouse receipts devolved upon petitioners by operation of law and were sold by them between January 4 and 9, 1943, upon the belief that they were "securities" expressly exempt from the pricing provisions of General Maximum Price Regulation and not covered by Maximum Price Regulation No. 193 as in effect during January, 1943.

On May 4, 1945, petitioners filed their protest with respondent, objecting to the applicability and validity of the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 with respect to sales by petitioners of warehouse receipts for bulk whiskey in January, 1943 (R. 2, 21). The protest was filed under authority of Section 203(a) of the Emergency Price Control Act. On June 2, 1945, respondent dismissed the protest for the stated reason that it did not comply with Section 203(a) of the Act (R. 22), and in so doing ignored the express provisions of Section 203(c) of the Act by failing to refer the protest, as requested by petitioners in their protest (R. 2), to a Board of Review before denying same. Such action by respondent also ignored Sections 35(b), 43 and

50 of Procedural Regulation No. 1 issued by him (*Infra*, pp. 20).

On June 22, 1945, petitioners duly filed their complaint with the Emergency Court of Appeals, as authorized by Section 204(a) of the Act, to review the action of respondent in dismissing their protest (R. 1-19). Respondent filed a motion to dismiss the complaint on the sole ground that "said complaint fails to state a claim upon which relief can be granted" (R. 20). On August 9, 1945, the Emergency Court of Appeals entered an order dismissing the complaint but filed no opinion or made any statement of the reasons for its action other than to state that it was "without jurisdiction to entertain the complaint" (R. 36).

Specification of Error to Be Urged

The United States Emergency Court of Appeals erred:

1. In dismissing the complaint filed by petitioners under Section 204(a) of the Emergency Price Control Act, as amended, to review the prior action of respondent in dismissing their protest on procedural grounds.

2. In failing to hold that petitioners had the unqualified statutory right under Section 203(a) of the Emergency Price Control Act to file a protest in May, 1945, attacking the applicability and validity of pricing provisions, in General Maximum Price Regulation and Maximum Price Regulation No. 193, which respondent was and is seeking to enforce against petitioners in a civil enforcement action for treble damages now pending in the United States District Court for the Western District of Kentucky.

3. In failing to hold that petitioners had the unqualified statutory right under Section 204(a) of the Emergency Price Control Act, as amended, to file their complaint with the United States Emergency Court of Appeals to review

the action of respondent in dismissing their protest duly filed with respondent under authority of Section 203(a) of the Act aforementioned.

4. In failing to hold that respondent violated the mandatory provision of Section 203(c) of the Emergency Price Control Act and his own regulations by omitting to comply with their request that their protest be referred to a Board of Review.

5. In failing to hold that Section 204(e) (1) of the Emergency Price Control Act, as amended, does not limit the statutory right of petitioners to protest the applicability and validity of the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 with respect to sales of warehouses receipts for bulk whiskey by petitioners in January, 1943, and does not expressly, or by implication, repeal the absolute right to protest granted petitioners by Section 203(a) of the Act.

6. In failing to hold that no claim by respondent of mere administrative inconvenience can justify the deprivation by the Court, through a strained construction of Section 204(e)(1) of the Emergency Price Control Act, of the absolute right of petitioners to protest the validity of pricing regulations under Section 203(a) of the Act and to have dismissal of their protest reviewed by filing a complaint with the Emergency Court of Appeals under Section 204(a) of the Act.

7. In failing to grant the relief sought by petitioners in their complaint.

8. In holding that the Court was "without jurisdiction to entertain the complaint."

Summary of Argument

Section 203(a) of the Emergency Price Control Act, as amended, bestows upon parties the unconditional right to

protest "at any time" the validity and applicability of maximum price regulations to which they are "subject." Within the meaning of Section 203(a) parties are "subject" to the provisions of maximum price regulations which are sought to be enforced against them to collect treble damages for alleged violations of the ceiling prices prescribed by such regulations. Upon dismissal, on procedural grounds, by the Price Administrator of their protest attacking the validity and applicability of the pricing regulations relied upon by the Price Administrator in a treble damage action, parties have an unqualified right, under Section 204(a) of the Act, to file a complaint with the Emergency Court of Appeals to review such action of respondent. In *Yakus* v. *United States*, 321 U. S. 414 this Court said (p. 437):

> The Emergency Court has power to review . . . any procedural error appropriately raised in the course of the proceedings.

The unconditional rights of parties to protest the validity and applicability of maximum pricing regulations under Section 203(a) of the Act, and to appeal from the decision of the Price Administrator by filing a complaint under Section 204(a) of the Act with the Emergency Court of Appeals, are in no way limited, abridged or repealed by the provisions of Section 204(e) of the Act, which latter Section merely gives to parties a cumulative, additional protection, by permitting the filing of a complaint with the Emergency Court of Appeals, upon leave obtained from the United States District Court, within five days *after* judgment against them in a civil proceeding. Otherwise to construe Section 204(e) will conflict with the Congressional intent in enacting Section 204(d) of the Act vesting the Emergency Court of Appeals with sole jurisdiction to decide the validity of maximum pricing regulations, and may have the effect

of wholly depriving parties of any right whatsoever to protest pricing regulations or to have the Emergency Court of Appeals review adverse action by the Price Administrator with respect to the applicability and validity of such regulations.

Even if General Maximum Price Regulation and Maximum Price Regulation No. 193 were applicable to sales of warehouse receipts for bulk whiskey and were superseded by Maximum Price Regulation No. 445, this did *not* affect a repeal of the statutory rights granted the public by Sections 203(a) and 204(a) of the Emergency Price Control Act, and under the principle announced in *United States* v. *Hark*, 320 U. S. 531, 536, these rights may be exercised by protest to the Price Administrator and appeal therefrom to the Emergency Court of Appeals when the Price Administrator seeks to collect treble damages from parties based upon the contention that parties have violated the ceiling prices prescribed by the superseded regulations.

If General Maximum Price Regulation and Maximum Price Regulation No. 193 were applicable to sales in January, 1943, of warehouse receipts for bulk whiskey, they were *not* superseded by Maximum Price Regulation No. 445 which became effective over *seven months after* petitioners sold their warehouse receipts. Section 7.4a of Maximum Price Regulation No. 445 expressly continued in effect General Maximum Price Regulation and Maximum Price Regulation No. 193 to provide maximum ceiling prices for sellers for whom no maximum ceiling prices were provided in Maximum Price Regulation No. 445. Obviously, Maximum Price Regulation No. 445 prescribed no ceiling prices for sales of warehouse receipts for bulk whiskey, made seven months *before* Maximum Price Regulation No. 445 became effective. Petitioners contend in their complaint (R. 5) that neither General Maximum Price Regula-

tion, Maximum Price Regulation No. 193 nor any other regulation *in effect during January, 1943*, prescribed any maximum ceiling prices applicable to the sale of warehouse receipts for bulk whiskey.

ARGUMENT

Section 203(a) of the Emergency Price Control Act grants to a party the unconditional right to protest "at any time" the legality of a maximum price regulation to which he is "subject."

The protest in the instant matter was filed as authorized by Section 203(a) of the Emergency Price Control Act, which section provides that

> "*At any time* after the issuance of any regulation or order under section 2, or in the case of a price schedule, *at any time* after the effective date thereof * * * any person *subject to* any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision * * *" (Italics supplied).

At the time the protest was filed in May 1945, there was (and now is) pending against petitioners and others, in the United States District Court for the Western District of Kentucky, a civil action instituted in June, 1943, by respondent to recover treble damages amounting to $6,799,101.51 for alleged sales in 1942 and 1943 of whiskey at prices in excess of the maximum ceiling prices prescribed by General Maximum Price Regulation and Maximum Price Regulation No. 193. Obviously, if there is any liability on the part of petitioners for such alleged sales in violation of maximum ceiling prices, it must be because petitioners *were and are* "subject" to the two regulations aforementioned. Hence the protest was properly filed under Section 203(a)

of the Act which authorizes the filing of a protest "at any time" after the issuance of a regulation by any person "subject" to any provision of such regulation. *Bowles* v. *Indianapolis Glove Company*, 150 F. 2d 597, 601(5).

Section 203(c) of the Emergency Price Control Act requires the submission of a protest to a Board of Review.

In dismissing the protest respondent ignored the mandatory provision of Section 203(c) of the Act by failing to refer the protest, as requested by petitioners in their protest (R. 2), to a Board of Review before denying same. Such action by respondent also ignored Sections 35(b), 43 and 50 of Procedural Regulation No. 1 issued by him (*Infra*, p. 26).

Section 204(a) of the Emergency Price Control Act grants to a party the unqualified right to have the dismissal of a protest reviewed by the Emergency Court of Appeals.

The language of Section 204(a) is free from any ambiguity. It gives petitioners an unqualified right to file a complaint to review the denial of their protest. See *Yakus* v. *United States*, 321 U. S. 414, 437. Respondent filed a motion to dismiss the complaint in the Emergency Court of Appeals and in his memorandum in support of the motion relied upon the prior decision of the Emergency Court of Appeals in *Krause Milling Company* v. *Bowles*, 148 F. 2d 845. The *Krause* case was decided by the Emergency Court of Appeals shortly after its decision in *Thomas Paper Stock Company* v. *Bowles*, 148 F. 2d 831, and merely follows the decision in the *Thomas* case. A writ of certiorari was granted in the *Thomas* case, No. 67, to review the dismissal of a complaint filed with the Emergency Court under Section 204(a) and is now awaiting argument.

Respondent may not maintain the pending civil action against petitioners under Section 205(e) of the Emergency Price Control Act unless petitioners are "subject" to the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193.

Section 205(e) of the Act authorizes respondent to institute a civil action, such as is *now pending* against petitioners, to collect treble damages against a person selling a commodity at a price in excess of maximum ceiling prices established by regulations of respondent, and such a suit must be brought within one year from the date of the occurrence of the violation. In the instant matter, action was instituted by respondent in the United States District Court for the Western District of Kentucky in June, 1943, to recover $6,799,101.51 from petitioners and others for alleged sales at prices in excess of maximum ceiling prices on whiskey established by General Maximum Price Regulation and Maximum Price Regulation No. 193. Unless petitioners are now "subject" to the provisions of the two price regulations aforementioned, within the meaning of Section 203(a) of the Act granting the right to protest, it must follow that they are *not* now "subject" to the provisions of Section 205(e) of the Act imposing liability for treble damages and that the treble damage action pending against petitioners in Kentucky must be dismissed because petitioners are no longer subject to the regulations relied upon by respondent in his enforcement action. Obviously, there is no basis for an interpretation of Section 203(a) different from that of Section 205(e). In other words, petitioners cannot on one hand be considered as *subject to* the pricing provisions of General Maximum Price Regulation No. 193 for the purpose of liability for treble damages and, on the other hand, be treated as *not subject to* the same regulations for the pur-

pose of filing a protest under Section 203(a) and having adverse action thereon reviewed by the Emergency Court of Appeals under Section 204(a) of the Act.

Rights granted the public under Sections 203(a) and 204(a) of the Emergency Price Control Act are not limited by Section 204(e)(1) of that Act.

The unqualified rights of petitioners to file a protest with respondent under Section 203(a) of the Act and to appeal from his decision thereon to the Emergency Court of Appeals by filing a complaint under Section 204(a) are in no way abridged by the provisions of Section 204(e) of the same Act. The latter Section merely gives petitioners a possible, additional protection by permitting the filing of a complaint with the Emergency Court of Appeals upon leave obtained from the United States District Court within five days *after judgment* against them in the pending civil action. This cumulative remedy is conditional and in the discretion of the District Court since Section 204(e) does not bestow upon a party an unqualified right to file a complaint with the Emergency Court of Appeals. In its prior decisions relied upon by respondent, the Emergency Court of Appeals has been guilty of judicial legislation in limiting the unconditional right of parties to file a protest under Section 203(a) and to have adverse action thereon reviewed by complaint filed under Section 204(a). It is believed that this Court will correct the prior errors of the Emergency Court of Appeals in its decision upon review of the *Thomas Paper Stock* case, Docket No. 67. As the dissenting opinion of Justice Laws in the *Thomas* case so forcefully points out, the prior opinions of the Emergency Court, limiting the right of protest under Section 203(a) and review of adverse rulings under Section 204 (a), are erroneous and in direct violation of the clear wording of the statute.

The action of the Emergency Court of Appeals Conflicts with the Congressional intent in enacting Section 204(d) of the Emergency Price Control Act.

Under Section 204(d) of the Emergency Price Control Act, as amended, *only* the Emergency Court of Appeals may decide the legality of pricing regulations issued by respondent. If parties may not (a) file a protest to question the legality of pricing regulations which have been superseded but which superseded regulations are the basis of a claim for treble damages as in the instant matter and (b) have action on their protest reviewed by the Emergency Court of Appeals, then, should the District Court *after judgment* against defendants and upon application by defendants under Section 204(e) (1) of the Act *not* permit the filing of a complaint with the Emergency Court of Appeals, the result will be that the parties are deprived of *all* right to have the validity of the regulations contested in the *only court* having jurisdiction to decide the question. Certainly such a result was not intended by the Congress in enacting Sections 204(d) and 204(e)(1), the latter of which sections merely gives to a party a cumulative, additional means of protection and does not expressly, or by implication, repeal the absolute rights to protest, and have adverse action thereon reviewed by the Emergency Court of Appeals, granted by Sections 203(a) and 204(a) of the Act.

It is of the utmost importance to the public that this Court not permit the Emergency Court of Appeals, under the guise of judicial legislation, to deprive parties of their unqualified statutory rights (a) to protest the applicability and validity of maximum pricing regulations under Section 203(a) and (b), to have action on the protest reviewed by the Emergency Court of Appeals under Section 204(a) merely because a possible—not an absolute—right is given

the parties under Section 204(e)(1) to file a complaint before the Emergency Court of Appeals *after judgment* in a civil enforcement action, but which possible right is subject to the absolute discretion of the District Court. Otherwise, Section 204(e)(1) instead of providing an additional cumulative means of protection may have the effect of wholly depriving parties of any right whatsoever to protest pricing regulations or to have the Emergency Court of Appeals review adverse action by respondent with respect to the applicability and validity of such regulations.

No claim by the respondent of mere administrative inconvenience can possibly justify the deprivation by the Emergency Court of Appeals, through a strained construction of Section 204(e)(1), of the absolute rights of parties to protest, and have reviewed by the Emergency Court, issues with respect to the applicability and validity of regulations. These rights are given the parties by Sections 203(a) and 204(a) of the Act. Substantive rights may not be subordinated to administrative convenience.

The suspension of a maximum pricing regulation does not repeal the statutory rights granted the public by Sections 203(a) and 204(a) of the Emergency Price Control Act.

Under the principle announced in *United States* v. *Hark*, 320 U. S. 531, 536, a protest may be employed under Section 203(a) of the Emergency Price Control Act to secure a determination as to the applicability and validity of maximum pricing regulations, which have been superseded prior to the filing of a protest, where an enforcement action for treble damages is pending, based upon the superseded regulations, at the time the protest is filed. Suspension or revocation of the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193, as contended by respondent, would not repeal Sections

203(a) and 204(a) of the Act. The statute, not the regulations issued by respondent, creates the right to protest and to review an adverse ruling thereon by complaint to the Emergency Court of Appeals.

Since the Act, Section 205(e), creates liability for penalties upon violation of maximum pricing regulations, *Cummins Distilleries Corporation* v. *Brown*, 56 F. Supp. 941, and enforcement of such liability after repeal of a pricing regulation is permitted under *United States* v. *Hark, supra*,[1] it must follow that Section 203(a) of the same Act permits protest of the applicability and validity of suspended or repealed pricing regulations and that Section 204(a) permits filing of a complaint with the Emergency Court of Appeals to review the action of respondent upon a protest when an enforcement action is instituted, as in the instant matter, to collect enormous penalties under the Act.

On April 2, 1943, respondent issued Supplementary Order No. 40. This order provides (8 Fed. Reg. 4325):

> 1305.54. *Effect of repeal, revocation, amendment or other modification of price regulations.* (a) The repeal, revocation, amendment or other modification of a price regulation or any part thereof shall not have the effect to release or extinguish any penalty or liability incurred under such price regulation unless otherwise expressly provided but such price regulation or part thereof shall be treated as remaining in force for the purpose of allowing or sustaining any proper suit, action, prosecution or proceeding with respect to such penalty or liability.

Assuming, but not conceding, the power of respondent to issue the above order, which power is denied in *United*

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[1] See Rev. Stat., sec. 13, as amended by Act of March 22, 1944, c. 123, 58 Stat. 118 (1 U. S. C., Supp. IV, sec. 29) permitting prosecutions after the lapse of a temporary statute (such as the Emergency Price Control Act) for offenses committed prior to its expiration.

States v. *Johnson*, 53 F. Supp. 167, it must follow that if repealed regulations may be treated "as remaining in force for the purpose of allowing or sustaining any proper suit, action, prosecution or proceeding with respect to such penalty or liability," then, for there to be any semblance of due process under the Fifth Amendment parties against whom a civil action for penalties is instituted must have the rights of protection granted them, by Sections 203(a) and 204(a) of the Emergency Price Control Act, to protest the applicability and validity of the regulations and to have the Emergency Court review the ruling of respondent upon the protest, since the Emergency Court *alone* is vested with jurisdiction to determine the validity of maximum pricing regulations. See *Yakus* v. *United States*, 321 U. S. 414.

If the contentions of petitioners are sound, a decision of respondent or of the Emergency Court of Appeals holding the pricing provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 inapplicable to, and that the regulations prescribed no ceiling prices on, sales of warehouse receipts for bulk whiskey by petitioners in January, 1943, will enable the latter to introduce the ruling in evidence as a complete defense at the trial in the enforcement action pending in Kentucky.

If General Maximum Price Regulation and Maximum Price Regulation No. 193 were applicable to sales in January, 1943, of warehouse receipts for bulk whiskey, they were not superseded by Maximum Price Regulation No. 445.

Maximum Price Regulation No. 445 (8 Fed. Reg. 11161) became effective August 14, 1943, or over *seven months after* petitioners sold warehouse receipts covering bulk whiskey in January, 1943. Clearly, the maximum ceiling prices prescribed by M. P. R. 445 could not apply to

actual sales and deliveries made seven months *before* its issuance.

Section 2.1(b) of M. P. R. 445 provides that M. P. R. 445 supersedes General Maximum Price Regulation and Maximum Price Regulation No. 193 "except as otherwise provided in this regulation". The exception is contained in Section 7.4a of M. P. R. 445 which provides:

> Maximum prices for sellers for whom no specific provision is made. The maximum price for any seller of distilled spirits or wine for whom no maximum price is provided in this regulation and who is otherwise unable to determine a maximum price hereunder, shall be his maximum price established by whichever of the following regulations of the Office of Price Administration is applicable: Maximum Price Regulation 193; General Maximum Price Regulation; National Regional or District Restaurant Maximum Price Regulations.

In other words, Section 7.4a of M. P. R. 445 expressly continued in effect General Maximum Price Regulation and Maximum Price Regulation No. 193 to provide maximum prices for any seller for whom no maximum ceiling price was provided in M. P. R. 445. Clearly, General Maximum Price Regulation and Maximum Price Regulation No. 193, *if applicable to sales of warehouse receipts for bulk whiskey in January, 1943*, were continued in effect to include such sellers as petitioners in the instant matter because their sales of warehouse receipts for bulk whiskey were made seven months *before* M. P. R. 445 became effective, and petitioners were "subject" to the former two regulations when their protest was filed with respondent on May 4, 1945. Hence, the principle (believed to be erroneous) announced by the Emergency Court of Appeals in *Thomas Paper Stock Company* v. *Bowles*, 148 F. 2d 831, in which a writ of certiorari has been granted, as No. 67, and *Krauss Milling Co.*

v. *Bowles;* 148 F. 2d 845 can have no application to the facts of the pending case. If "subject" to General Maximum Price Regulation and Maximum Price Regulation No. 193 on May 4, 1945, with respect to sales in January, 1943, of warehouse receipts for bulk whiskey, it must follow that petitioners had the unqualified rights under Section 203(a) and 204(a) of the Act to protest the applicability and validity of these regulations before respondent and to appeal from his dismissal of their protest by filing a complaint with the Emergency Court of Appeals. Petitioners contend (R. 5) that neither General Maximum Price Regulation, Maximum Price Regulation No. 193 nor any other regulation prescribed any ceiling price for sales in January, 1943, of warehouse receipts for bulk whiskey. If this is true, there is no basis for the pending treble damage action.

Conclusion

This Court will not, of course, decide any question here as to the constitutionality or statutory validity of General Maximum Price Regulation or Maximum Price Regulation No. 193, matters that must in the first instance be presented, and *actually were presented* in the instant case, to the Emergency Court of Appeals and that court erroneously dismissed the complaint and refused to decide the issues. *Bowles* v. *Seminole Rock & Sand Company*, 324 U. S. —, decided June 4, 1945, 89 L. Ed. 1186.

The decision of the court below dismissing the complaint is erroneous and should be reversed.

Respectfully submitted,

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October, 1945.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess., are as follows:

Section 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increase in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work to-

ward a stabilization of prices, fair and equitable wages, and cost of production.

. . . . . .

Sec. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act.

. . . . . .

Sec. 203. (a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.

. . . . . .

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs: Provided, however, That, upon the request of the protestant, any protest filed in accordance with subsection (a) of this section after September 1, 1944, shall, before denial in whole or in part, be considered by a board of review consisting of one or more officers or employees of the Office of Price Administration designated by the Administrator in accordance with regulations to be promulgated by him. Such regulations shall provide that the board of review may conduct hearings and hold sessions in the District of Columbia or any other place, as a board, or by subcommittees

thereof, and shall provide that, upon the request of the protestants and upon a showing that material facts would be adduced thereby, subpoenas shall issue to procure the evidence of persons, or the production of documents, or both. The Administrator shall cause to be presented to the board such evidence, including economic data in the form of affidavits or otherwise, as he deems appropriate in support of the provision against which the protest is filed. The protestant shall be accorded an opportunity to present rebuttal evidence in writing and oral argument before the board, and the board shall make written recommendations to the Price Administrator. The protestant shall be informed of the recommendations of the board and, in the event that the Administrator rejects such recommendations in whole or in part, shall be informed of the reasons for such rejection.

* * * * * * *

Sec. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding:

* * * * * * *

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Two judges shall constitute a quorum of the court and of each division thereof. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a

judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and *within five days after judgment in any civil* or criminal *proceeding*, brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and sub-

stantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203(a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection. (Emphasis supplied)

Section 205. (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling

of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

* * * * * * *

Sections 35(b), 43 and 50 of Procedural Regulation No. 1 issued by respondent provide as follows:

Section 35(b) *Request for consideration by a board of review.* A protestant who wishes his protest considered by a board of review must specifically so request, indicating, if he wishes to offer oral argument, the order of his preference as to (1) argument before a board of review in Washington, D. C.; (2) argument before a subcommittee consisting of one member of a board at a location named by him. Section 45 of this revised procedural regulation sets forth the considerations which will be determinative in the decision as to where oral argument may be heard. The request for consideration by a board of review must be made either in the protest or in an amendment thereto filed

within fifteen days of the date the protest is filed. Such an amendment shall be deemed filed within the fifteen day period if it is received by the Secretary, Office of Price Administration, Washington, D. C., or by the director of the appropriate territorial office, no later than the fifteenth day after the protest was filed. Further provisions with respect to proceedings before a board of review are to be found in sections 43 to 50, inclusive, of this regulation.

Section 43. *Right to consideration by a board of review.* Under section 203(c) of the Act, a protest filed after September 1, 1944 must, upon the protestant's request, be considered by a board of review before it can be denied in whole or in part. Consideration of the record in a protest proceeding by a board of review is undertaken for the purpose of reconsidering the provision or provisions of the maximum price regulation protested and recommending action relative thereto to the Administrator. A board of review considers the protest upon the basis of the record which has been developed in the proceedings. Protestant is accorded an opportunity to present oral argument to a board, upon the basis of the objections raised in the protest and the evidence in the record, and guided by the explanatory statement of the issues in the notice of consideration by a board of review. Section 34 of this revised procedural regulation explains the nature of the record in the proceedings. Section 35(b) explains the nature of such a request and states the time within which it must be filed.

Section 50. Action by Administrator after receipt of board of review's recommendations. After receipt of a board of review's recommendations as to the disposition of the protest, the Administrator shall, within a reasonable time, grant or deny the protest in whole or in part.

No. 393

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

CHRISTINE COLLINS, A. J. CUMMINS, YANCEY LEE CUMMINS AND EDWARD J. MILLER,

Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

REPLY BRIEF FILED BY PETITIONERS

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I. The Instant Case Is Not Moot

In this proceeding two main issues were raised in the protest to the Price Administrator and in the complaint filed with the Emergency Court under Section 204(a) to review dismissal of the protest by the Price Administrator. These were (1) that the Emergency Price Control Act does not, and may not constitutionally, authorize regulation of whiskey sales in Kentucky and (2) if the Act does authorize regulation of whiskey sales in Kentucky, that M. P. R. 193,

as in effect prior to February 3, 1943 (7 Fed. Reg. 6006), did not fix any ceiling price on sales of warehouse receipts for bulk whiskey such as were made by petitioners in January, 1943. Neither the Price Administrator nor the Emergency Court of Appeals passed upon either issue raised by petitioners. Each dismissed the proceeding before it for alleged lack of jurisdiction.

The opinion of the Emergency Court of Appeals in *Collins* v. *Bowles*, decided January 10, 1946 (copy filed with Clerk by respondent) involved a complaint filed under Section 204(e) (1) of the Price Act. There the court expressly refused to decide the issue whether sales of warehouse receipts for bulk whiskey were covered by any price regulation. The court said (p. 2):

> "Complainants insist that sales of warehouse receipts are not covered by the regulations. *With that issue we are not concerned in this case.*" (Emphasis supplied.)

and it is obvious that the decision cited could not render the instant proceeding moot since the Emergency Court therein expressly refused to pass upon one of the material issues raised in the protest filed by petitioners herein before the Price Administrator and urged in their complaint filed with the Emergency Court of Appeals under Section 204(a) to have it review the action of the Price Administrator in dismissing the protest on jurisdictional grounds.

That the Emergency Court must pass upon the issue of coverage and application of M.P.R. 193 raised in the instant case is clear from its prior decisions in other cases filed under Section 204(a) to review denials of protests by the Price Administrator. In *Lincoln Sav. Bank of Brooklyn* v. *Brown*, 137 F. (2d) 228, the court said (p. 229):

> "This complaint, filed after the denial of the protest by the Price Administrator, involves a *dual cu-*

quiry. Complainant maintains that the Emergency Price Control Act of 1942 (the Price Act) does not authorize regulation of its safe deposit box rentals, *or*, if it does, that the regulations promulgated thereunder do not subject these rentals to regulation." (Emphasis supplied.)

Further, the court said (p. 231):

> "But the complainant contends that the Price Administrator has not acted effectively to subject its storage service to regulation. This necessitates scrutiny of the regulations promulgated under authority of the Price Act to ascertain whether they included safe deposit storage services rendered in connection with the three types of commodities involved."

The Emergency Court held (p. 233):

> "We therefore hold that the prices charged for the rental of the complainant's safe deposit box facilities are within the class which the Price Administrator was authorized to subject to regulation by the terms of the Price Act, *and* that he has proceeded properly under the authority delegated to him to subject this commodity to such regulation." (Emphasis supplied.)

In *The Alan Levin Foundation* v. *Bowles*, — F. (2d) —, decided December 5, 1945, the Emergency Court held, in another complaint filed under Section 204(a) to review action of the Price Administrator upon a protest, that *before* the court could reach the question of validity *it must determine whether the regulation was applicable to complainant.* This case is cited in *Collins* v. *Bowles, supra.*

II. Original M.P.R. 193 Does Not Apply to Incidental Sales by Petitioners

As first promulgated, M.P.R. 193 made no reference to bulk whiskey or warehouse receipts.

The definition of "domestic distilled spirits" in original M.P.R. 193 covers "any and all" distilled spirits which are included in Classes 2 to 7 of Article II of Regulation No. 5, as amended, of the Federal Alcohol Administration Relating to Labelling and Advertising of Distilled Spirits (27 Code of Federal Regulations, pages 36 to 41). Class 2 of Regulation No. 5 aforementioned merely defines various types of whiskey, such as rye whiskey, bourbon whiskey, straight whiskey, blended whiskey, Canadian whiskey, blended Scotch type whiskey, etc.; Class 3 refers to gins, Class 4 to brandies, Class 5 to rum, Class 6 to cordials and liqueurs and Class 7 to imitations.

The Price Administrator contends (a) that the words "any and all" might cover bulk and packaged distilled spirits and (b) that Class 2 of Article II of Regulation No. 5 aforementioned could embrace whiskey in general, whether in bulk or in packages.

Petitioners contend (1) that the Statement of Considerations issued in connection with M.P.R. 193 and the language of the regulation itself reveal that the regulation was intended to apply *only* to *packaged* goods and that the sole purpose of the regulation was to "permit sellers at all levels" (meaning manufacturers, wholesalers and retailers who are part of the *industry*) to pass on new or increased costs, including taxes, in the sale of *packaged goods* which were distributed in the normal channels of commerce from manufacturer to wholesaler to retailer, and (2) that even if M.P.R. 193 could be interpreted to cover the sale of bulk

whiskey, petitioners are *not* within the *class of sellers* for whom maximum prices are prescribed in the regulation for the following reasons:

(a) *Statement of Considerations accompanying M.P.R. 193.*—The language of the Statement of Considerations acompanying M.P.R. 193 manifests that the regulation was promulgated to *afford relief* to manufacturers, rectifiers, wholesalers and retailers regularly engaged in the *industry*. Pertinent extracts from the Statement of Considerations and observations with respect thereto are:

> 1. "Since March 1942 the effect of certain orders of the War Production Board and the incidence or threatened incidence of certain Federal and State taxes have imposed or threaten to impose *unjust hardship* upon *sellers* of domestic distilled spirits." (Emphasis supplied.)

This must refer to "sellers" in the regular course of business, not to parties such as petitioners who were not in the business of selling domestic distilled spirits and whose *only sales* were of warehouse receipts for bulk whiskey which devolved upon them by operation of law; and

> 2. Continuous references are made in the Statement of Considerations to the *unjust hardship* upon "distillers and rectifiers" caused by the increased cost of using high wines, the rectification taxes and the increased Federal excise taxes to which distillers and rectifiers had not previously been subject; and
>
> 3. "It is the opinion of the Price Administrator that the *domestic distilled spirits industry* should be permitted to pass on to consumers the increased cost consequent upon the enforced use of the substitute high wines"; and

4. "That the *industry* must be permitted to pass on the proposed increased taxes so that *it may continue to operate*"; and

5. "The Federal tax is a tax upon the *manufacturer*, but an increase in such tax will be accompanied by a Floor Stocks tax of equal amount which is payable by *wholesalers* and *retailers*. Moreover, many State taxes are imposed upon *wholesalers* and *retailers* rather than upon the *manufacturer*"; and

6. "Accordingly, it will be necessary to permit *sellers at all levels* to pass on new taxes or increases in existing taxes which are imposed upon and paid by them after March 1942 with respect to domestic distilled spirits." (Emphasis supplied.)

(b) *Original M.P.R. 193.*—An analysis of Section 1420.13 of M.P.R. 193 clearly shows that the regulation only purported to cover *sales* (1) by manufacturers and (2) by sellers other than manufacturers, meaning wholesalers and retailers who *purchased* from their "supplier". Petitioners did not come within either *class of seller*, and their *incidental sales* of warehouse receipts for bulk whiskey (delivered to them upon the dissolution of the Cummins Distilleries Corporation) are not covered by the regulation. Petitioners had no "customers" such as are referred to in subparagraph (a)(3) of Section 1420.13 under the heading of "Notification"; and did not *purchase* the warehouse receipts for the bulk whiskey.

M.P.R. 193 covered only packaged goods which were sold by and purchased from manufacturers, and sold by "sellers other than manufacturers", which could only mean wholesalers who purchased from manufacturers and retailers who purchased from wholesalers. The purpose of M.P.R. 193 was to "*permit sellers at all levels*" to pass

on new or increased taxes and only packaged goods were dealt in by sellers in all three levels; and

Section 1420.13(a)(2) of the regulation uses the words "seller's supplier", meaning manufacturer or wholesaler, and permits sellers other than manufacturers to add to their "supplier's" price the difference between the maximum price for the "supplier" under General Maximum Price Regulation and M.P.R. 193, plus taxes. Obviously, the Cummins Distilleries Corporation was *not* the "seller's supplier" and petitioners were not its "customers" within the meaning of the quoted words from the regulation. Petitioners had no "supplier" or "customers" as those words are used in the regulation. The only warehouse receipts for bulk whiskey which petitioners possessed came to them through dissolution of—*not sale by*—the Cummins Distilleries Corporation.

(c) *Summary.*—Obviously, under any fair interpretation of M.P.R. 193 and the Statement of Considerations issued in connection therewith the regulation cannot be construed to cover the *incidental sales* made by petitioners in disposing of their warehouse receipts for bulk whiskey. Petitioners were not part of the *industry*, and their sales were not in the ordinary course of business. M.P.R. 193 was not promulgated to *relieve* parties in the position of petitioners from any *undue hardship*. Petitioners were not manufacturers, wholesalers or retailers of domestic distilled spirits; they were not "sellers" and had no "seller's supplier" or "customers" as the quoted words are used in the regulation.

(d) *Prior case distinguished.*—In *Brown v. Cummins Distilleries Corporation*, 53 F. Supp. 659, the District Court held (a) that warehouse receipts for bulk whiskey stored in a bonded warehouse are not securities in the usually

accepted meaning of the term; (b) that the warehouse receipts in question were not securities exempted from the provisions of the Price Act; (c) that the sales of warehouse receipts by defendants therein were sales of bulk whiskey covered by the receipts and (d) that original M.P.R. 193 covered the sale of bulk whiskey and that Amendment No. 4 thereto did not, for the first time, establish maximum prices for bulk whiskey.

The decision in *Brown* v. *Cummins Distilleries Corporation, supra*, did *not* hold that the defendants therein were within the *class of sellers* for whom maximum prices were prescribed by original M.P.R. 193. Further, the decision did *not* consider the Statement of Considerations issued in connection with original M.P.R. 193, which Statement of Considerations clearly shows that the regulation was promulgated to cover *only* sales by manufacturers, wholesalers and retailers so as to allow these "sellers at all levels" to pass on new costs, including taxes, to their *customers*. Likewise, the decision did *not* analyze pertinent and controlling language in original M.P.R. 193 which language cannot possibly be construed to apply to *incidental sales* by the petitioners herein, who are neither manufacturers, wholesalers or retailers. It is, therefore, obvious that the question whether petitioners are within the *class of sellers* for whom maximum prices were prescribed in original M.P.R. 193 is thus an open question.

III. Amendment No. 4 to M.P.R. 193 First Prescribed Maximum Prices for Sales of Bulk Whiskey

The sale by petitioners of warehouse receipts for bulk whiskey took place between January 4 and 9, 1943. Thereafter, on February 3, 1943, respondent promulgated Amendment No. 4 to M.P.R. 193 (8 Fed. Reg. 1632). The Amend-

ment made no change in the prior definition of "domestic distilled spirits" contained in original M.P.R. 193. However, by this Amendment respondent for the *first time* considered *bulk whiskey* and *warehouse receipts* in a regulation and placed a ceiling price upon bulk whiskey in accordance with its age. Amendment No. 4 defined "domestic bulk whiskey" and "warehouse receipt" as follows:

> "Domestic bulk whiskey" shall mean any and all whiskey produced in the continental United States (excepting malt whiskey) which is sold in containers having a capacity in excess of one wine gallon.
>
> "Warehouse receipt" shall mean a warehouse receipt for domestic bulk whiskey as set forth in section 3 of Regulation No. 3 issued by the Federal Alcohol Administration relating to bulk sales and bottling of distilled spirits.

Amendment No. 4 in Appendix A, Section 1420.13(c) provided:

> The seller's maximum prices for sales of domestic bulk whiskey in bond by transfer of *warehouse receipt* or other evidence of title, or otherwise, shall be the maximum prices set forth in paragraph (g) in accordance with the age of such whiskey to be priced hereunder. (Emphasis supplied.)

and in Appendix A, Section 1420.13(g) prescribed maximum prices for bulk whiskey per original proof gallon in accordance with the age of the whiskey.

In the "Statement of Considerations" accompanying Amendment No. 4 reference is made by respondent to his recent "Study of the Market for sales of domestic whiskey in bulk" and then it is stated:

> Warehouse receipts for bulk whiskey are traded in the investment market as quasi negotiable instruments.

> Such receipts are not securities, however, but are documents evidencing title to a commodity that has been warehoused, and as such the maximum prices therefor *must be established* under the provisions of Maximum Price Regulation 193. (Emphasis supplied.)

thereby indicating necessity for amendment of the regulation to assure its *future* application to all sales of warehouse receipts for bulk whiskey.

IV. Decision by Court upon Coverage under Original M.P.R. 193 Is Important to Petitioners

Petitioners contended before the Price Administrator and the Emergency Court of Appeals, *on appeal under Section 204(a)*, that prior to February 3, 1943, the effective date of Amendment No. 4 to M.P.R. 193 (8 Fed. Reg. 1632), M.P.R. 193 did not prescribe any ceiling price on sales of warehouse receipts for bulk whiskey consummated by petitioners in January, 1943. An interpretation to this effect by the Price Administrator and the Emergency Court may have an important bearing upon the treble damage action pending against petitioners and others in the District Court for the Western District of Kentucky. (Section 204(e)(2) of the Emergency Price Control Act.) Petitioners are entitled to a ruling by the Price Administrator *and* the Emergency Court upon the issue whether M.P.R. 193, as in effect prior to February 3, 1943, covered the sales by petitioners in January, 1943, of warehouse receipts for bulk whiskey. *Conklin Pen Company* v. *Bowles* — F. (2d) —, decided January 11, 1946 by the Emergency Court of Appeals holds that in proceedings under Section 204(a) of the Act, *unlike* an appeal under Section 204(e)(1), a complainant who asserts that a regulation, if applied to him,

is invalid, and that, properly construed, the regulation is inapplicable, *has the right to have the interpretation of the regulation passed upon by the Emergency Court.*

V. Other Action by Respondent of Which This Court May Take Judicial Notice Likewise Proves That Incidental Sales by Petitioners of Warehouse Receipts Covering Bulk Whiskey Were Not Subject to Maximum Prices Prescribed in M.P.R. 193 as in Effect During January, 1943.

Proof that the sales by petitioners in January 1943 of warehouse receipts for bulk whiskey were not subject to maximum prices established under M.P.R. 193, as then in effect, and that the Price Administrator has a total disregard for the statutory rights granted the public under Sections 203(a) and 204(a) of the Price Act, is graphically shown by Order No. 45 of June 13, 1945 issued by respondent under purported authority of General Maximum Price Regulation, Section 1499.3(c). This Order appears in 10 Fed. Reg. 7206, issue of June 15, 1945. Through it respondent attempted on June 13, 1945 to promulgate inchoate, retroactive maximum prices for sales of the identical warehouse receipts, covering bulk whiskey, which are involved in the instant proceeding despite the fact that these sales had been consummated in January 1943, or over two years before issuance of Order No. 45. The "Opinion", issued in lieu of a Statement of Considerations, accompanying Order No. 45 expressly states that the Order "will be applicable only" upon findings by the District Court that petitioner sold the bulk whiskey involved in the litigation and that maximum prices for their sales could not be established under Section 1420.13(a) or (b) of M.P.R. 193.

Order No. 45 is a plain admission by respondent that M.P.R. 193, as in effect during January 1943, did not prescribe any maximum prices applicable to the sales by petitioners in January 1943 of warehouse receipts covering bulk whiskey. Otherwise, there would have been no necessity for the issuance of Order No. 45. Furthermore, Order No. 45 is an admission by respondent that maximum prices for the *prior* sales by petitioners were not prescribed by Amendment 4 to M.P.R. 193, effective February 3, 1943, and *after* the sales were consummated in January 1943. Nevertheless, subparagraphs (a) (2) and (3) of Order No. 45 seek to prescribe, and to incorporate therein by reference, the maximum prices prescribed by Amendment 4 to M.P.R. 193 so as to make the inchoate retroactive prices thus established on June 13, 1945 applicable to prior sales in January 1943 *if* the District Court makes certain findings.

The display of chicanery evidenced by Order No. 45 shockingly reveals how completely the statutory and constitutional rights of the public will be ignored under the guise of "administrative convenience" if the argument of respondent is adopted in this case.

Some other pertinent observations respecting Order No. 45 are believed appropriate in view of the extraordinary nature of the Order. First, the Order was concocted by respondent in June 1945, for use in a pending enforcement action, to inflict heavy penalties upon innocent citizens by subjecting their prior sales to maximum prices not in effect when the sales of warehouse receipts were made in January 1943; the Order is violative of Article I, Section 9, Clause 3 of the Federal Constitution as an ex post facto law. Second, in its practical operation the Order deprives petitioners of their statutory rights under Sections 203(a) and 204(a) of the Price Act to protest any maximum prices

which *may* become effective at the trial and to appeal to the Emergency Court from an adverse ruling by respondent because petitioners cannot possibly protest, for lack of time, maximum prices that only become applicable during the *actual* trial of the enforcement action for treble damages; the Order deprives petitioners of their statutory rights and denies them due process of law in violation of the Fifth Amendment. Third, the Order conflicts with the Congressional intent in enacting Section 204(d) of the Price Act in that the Order seeks to deprive petitioners of *all* opportunity to have the Emergency Court pass upon the validity of maximum prices which *may* become effective under the Order at the trial of the enforcement action depending upon findings by the District Court. Fourth, the Order unduly seeks to delegate authority to the District Court in that it conditions the application and effective date of inchoate, maximum prices upon findings to be made by the District Court at the trial of the enforcement action, and respondent possesses no such power to delegate authority. *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 539-542.

VI. Conclusion

The case is not moot. The decision of the Emergency Court of Appeals dismissing the complaint is erroneous and should be reversed. In view of the facts disclosed by (a) an analysis of Original M.P.R. 193 and the Statement of Considerations issued in connection therewith, (b) an examination of Amendment 4 to M.P.R. 193, and (c) the admissions inherent in Order No. 45 and the "Opinion" accompanying the Order, this Court would be justified in rendering final judgment sustaining the contention of petitioners that their incidental sales in January 1943 of ware-

house receipts covering bulk whiskey were not subject to maximum prices established by M.P. R. 193, as in effect during January 1943 when the sales were consummated.

Respectfully submitted,

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February, 1946.

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 393

CHRISTINE COLLINS, A. J. CUMMINS, YANCEY LEE CUMMINS AND EDWARD J. MILLER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

MEMORANDUM FOR THE RESPONDENT

This case arises out of the dismissal by the Price Administrator of a protest which petitioners filed with the Price Administrator on May 4, 1945, objecting to regulations establishing maximum prices for bulk and packaged liquors which had been superseded in 1943. A complaint which petitioners filed against the refusal by the Price Administrator to entertain this protest was dismissed by the Emergency Court of Appeals (R. 36).

It appears that petitioners' concern as to the legality of the superseded provisions arose out of

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two enforcement actions which had been instituted in the United States District Court for the Western District of Kentucky (R. 23). In one action, which involves sales of warehouse receipts for bulk whiskey, petitioners applied to the district court under Section 204 (e) (1) of the Emergency Price Control Act of 1942, as amended (herein termed "the Act"), for leave to file a complaint with the Emergency Court of Appeals setting forth objections to the validity of regulatory provisions which defendants were alleged to have violated. The district court granted this application and on June 2, 1945 petitioners filed a complaint with the Emergency Court of Appeals (Docket No. 231) setting forth objections to the regulatory provisions applicable to sales of bulk whiskey. In the other enforcement action, which involves maximum prices for both packaged liquors and bulk whiskey, it does not appear that application to file a complaint with the Emergency Court of Appeals has been made.

The petition suggests that the protest proceeding, from which the present case originated, was concerned only with the legality of maximum prices for transfers of bulk liquor by means of warehouse receipts, the issue which is now pending on the merits before the Emergency Court of Appeals. If this were so, a decision in the latter case would, we believe, render the instant proceeding moot. However, the protest filed with the Price Administrator also sought to raise cer-

tain questions as to the validity of the regulatory provisions applicable to packaged liquors—questions which are not available to petitioners in the proceeding now pending before the Emergency Court of Appeals. Consequently it does not now appear that the present case will become wholly moot.

The question presented by the petition is whether the Price Administrator is obliged to entertain a protest filed under Section 203 (a) of the Act which attacks a maximum price regulation which had been superseded prior to the filing of the protest. Substantially the same question was involved in the decision of the Emergency Court of Appeals in *Thomas Paper Stock Company, et al.*, v. *Bowles*, 148 F. (2d) 831. In the latter case this Court has granted a petition for a writ of certiorari (No. 67, present Term). Respondent believes that the court below correctly decided both the *Thomas Paper Stock* case and the present case. In view, however, of the granting of certiorari in the *Thomas Paper Stock* case respondent does not oppose the granting of the writ in the present case.

Respectfully submitted.

HAROLD JUDSON,
Acting Solicitor General.

SEPTEMBER 1945.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 393

CHRISTINE COLLINS, ET AL., PETITIONERS

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE PRICE ADMINISTRATOR

OPINION BELOW

No opinion was rendered by the United States Emergency Court of Appeals in the disposition of this cause.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered August 9, 1945 (R. 36). The petition for a writ of certiorari was filed August 31, 1945, and was granted November 5, 1945 (R. 38). Jurisdiction of this Court rests on Section 204 (d) of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended

by the Stabilization Extension Act of 1944, 58 Stat. 632, 50 U. S. C. App., Supp. IV, 924 (herein sometimes called "The Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Whether under Section 203 (a) of the Emergency Price Control Act, as amended, a protest may properly be filed challenging the validity of certain provisions of a maximum price regulation in relation to completed transactions, after the provisions in question have been revoked by the Price Administrator or have been superseded by new regulations.

2. Whether the Price Administrator erred in dismissing the protest filed by petitioners without referring the protest, pursuant to Section 203 (c) of the Act, to a Board of Review for its consideration.

3. Whether the judgment entered by the Emergency Court of Appeals on December 19, 1945, in the case of *Collins, et al.* v. *Bowles,* Docket No. 231, holding the regulations involved to be valid, has rendered moot the issues presented in the case at bar.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, appear in the Appendix, *infra.* The maximum price regulation involved and pertinent amendments thereto

appear in the Federal Register (7 F. R. 6006; 8 F. R. 1632, 11162).

STATEMENT

On May 4, 1945, petitioners, purporting to act under Section 203 (a) of the Emergency Price Control Act, as amended, *infra*, pp. 24–25, filed a protest with the Price Administrator challenging the validity of regulatory provisions governing maximum prices for the sale of whiskey as applied to certain sales of whiskey which had been consummated by petitioners in January, 1943. The prices for these sales had been governed by Maximum Price Regulation No. 193 (7 F. R. 6006), which, subsequent to the transactions and prior to the filing of the protests, was superseded by new regulatory provisions containing substantially different pricing techniques.[1]

[1] At the time of the transactions in question maximum prices for whiskey were established under Maximum Price Regulation No. 193 by the so-called "freeze" pricing method, requiring reference in the first instance to the price charged by the seller in March 1942, or in the absence of such a sale, to the maximum price of his most closely competitive seller. One of the objections set forth in the protest was that this type of control was invalid for uncertainty.

On February 3, 1943, by Amendment No. 4 to the Regulation (8 F. R. 1632) these provisions were superseded as to bulk whiskey by the establishment of dollars-and-cents maximum prices. On August 9, 1943, Maximum Price Regulation No. 445 (8 F. R. 11161) superseded the earlier regulation in its control over both bulk and packaged whiskey, preserving the dollars-and-cents prices for bulk whiskey first specified on February 3, 1943, and supplanting "freeze" prices for

The protest was dismissed by the Price Administrator on the ground that the protest procedure could not properly be invoked to test the validity of regulatory provisions which had been superseded prior to the filing of the protest (R. 21–26). For this reason, the Price Administrator did not consider the merits of petitioners' objections to these superseded provisions or refer the protest to a Board of Review for its consideration under Section 203(c) of the Act. Thereupon, petitioners filed a complaint with the Emergency Court of Appeals pursuant to Section 204(a) of the Act setting forth objections to this disposition of the protest (R. 1–19). The Emergency Court of Appeals, on motion by respondent, dismissed the complaint on the ground that it was without jurisdiction to entertain it (R. 36). This decision is the subject of the present review on certiorari.[2]

In June 1943 respondent instituted against petitioners a civil enforcement action in the United States District Court for the Western District of Kentucky under Section 205(e) of the Act to recover treble damages on account

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wholesalers and retailers with specified maximum markups over cost.

[2] Substantially the same question is involved in the decisions of the Emergency Court of Appeals in *Thomas Paper Stock Company* v. *Bowles*, 148 F. 2d 831, and in *Utah Junk Company* v. *Bowles*, 150 F. 2d 963. This Court has granted certiorari in both causes (Nos. 67 and 400, at the present Term).

of alleged violations of the regulations in connection with the sales in January 1943 of the bulk whiskey (R. 15–16). On July 9, 1945, petitioners filed in the district court an application under Section 204(e) of the Act for leave to file a complaint with the Emergency Court of Appeals setting forth objections to the regulatory provisions which the petitioners were alleged to have violated. The district court granted the application, and pursuant thereto petitioners filed a complaint with the Emergency Court of Appeals setting forth their objections to the regulations in question (E. C. A. Docket No. 231). All proceedings before the Emergency Court of Appeals were completed and on January 10, 1946, that court rendered its decision on the merits of petitioners' objections to the pertinent regulations, holding the regulations to be valid in all respects.

SUMMARY OF ARGUMENT

1. Section 203 (a) of the Emergency Price Control Act does not authorize the filing of a protest setting forth objections to the validity of price regulations which have been revoked or superseded prior to the filing of the protest, and the Emergency Court of Appeals has jurisdiction to entertain a complaint filed under Section 204 (a) of the Act only when the protest upon which it is based has been properly filed under Section 203 (a) thereof. Moreover, to require the Price Administrator to entertain protests concerned

solely with the validity of price regulations which have been revoked or superseded prior to the filing of the protest, would be inconsistent with the basic plan for protest proceedings and would compel a serious diversion from the Administrator's statutory duty to prevent inflation. The Congress has provided in Section 204 (e) of the Act the appropriate and exclusive remedy to be followed by persons concerned solely with the past validity of regulatory provisions, and the attempt to circumvent these statutory provisions by recourse to protest proceedings in situations like that in the present case might lead to difficult problems of judicial administration.

2. The Price Administrator did not err in dismissing petitioners' protest without referring it to a Board of Review for its consideration under Section 203 (c) of the Act. That section does not require that a protest which was improperly filed, and therefore subject to dismissal, be referred to a Board for its consideration, since it was the Congressional intention that the Board should review cases only on their merits.

3. The judgment entered by the Emergency Court of Appeals on January 10, 1946, in the case of *Collins, et al.* v. *Bowles,* Docket No. 231, holding valid the regulation to which petitioners object, has rendered moot the issues presented by the case at bar, since petitioners have now obtained a judicial review of the regulation involved.

ARGUMENT

In the case at bar the Emergency Court of Appeals dismissed petitioners' complaint without announcing the grounds for the dismissal other than to state that it was without jurisdiction to entertain the complaint. However, the principal issue presented in the case is whether the protest proceedings provided for in Section 203 (a) of the Emergency Price Control Act can be employed to test the validity of a price regulation which has been revoked, or which has been superseded by another substantially different regulation. It may be assumed, therefore, that the Emergency Court of Appeals dismissed the complaint in this case for the same reasons stated by it in its prior decision in the similar case of *Thomas Paper Stock Company* v. *Bowles,* 148 F. 2d 831, now pending on a writ of certiorari in this Court, No. 67 at the present Term. See also *Krause Milling Company* v. *Bowles,* 148 F. 2d 844 (E. C. A.).

I

THE COURT BELOW WAS CORRECT IN INTERPRETING THE EMERGENCY PRICE CONTROL ACT AS NOT PERMITTING THE FILING OF A PROTEST SOLELY FOR THE PURPOSE OF SECURING A DETERMINATION AS TO THE VALIDITY OF A REGULATION WHICH HAS BEEN REVOKED OR SUPERSEDED

As originally enacted, Section 203 (a) of the Emergency Price Control Act of 1942 (56 Stat. 31) provided that a protest to obtain administra-

tive reconsideration of the validity of a price regulation issued under that Act, might be filed by any person subject to such regulation within sixty days after the regulation was issued, or at any time after the expiration of the sixty days solely on a ground arising after the sixty days had expired. And Section 204 of that Act provided that any person aggrieved by the denial of a protest might obtain judicial review of the validity of the regulation by filing a complaint in the Emergency Court of Appeals created by that section, with a right to further review by this Court on a writ of certiorari. The judicial review provided for by the section was made exclusive.

By the Stabilization Extension Act of June 30, 1944, 58 Stat. 638 (hereinafter sometimes called "The 1944 Amendment"), the Congress, in amending the Emergency Price Control Act, changed the language in Section 203 (a), *infra,* p. 24, which governed the time for filing protests, by striking out the sixty-day provision and by providing that protests might be filed "at any time after the issuance of any regulation or order." Section 204 was also amended, *infra,* p. 28, by adding a new subsection (e)[3] wherein it was provided, *inter alia,* that in a criminal or civil proceeding brought under Section 205 of the Act, the defendant, notwithstanding the fact

[3] Section 204 (e) was again amended by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess., but the amendment is not relevant to the issues in the case at bar.

that he had not filed a protest under Section 203 (a), might, with the consent of the district court, file a complaint in the Emergency Court of Appeals to test the validity of the price regulation involved in the enforcement proceeding, provided that the district court should find the objection to the regulation to have been made in good faith, and should also find reasonable and substantial excuse for the defendant's failure to file a protest under Section 203 (a).

Petitioners contend that under the amendatory language in Section 203 (a) they may employ the protest procedure to test the validity of a price regulation which has been superseded at the time they file the protest. This contention not only offends the language of Section 203 (a), but it is also in conflict with the entire procedure established by Sections 203 and 204 of the Act for obtaining administrative reconsideration and judicial review of price regulations. The nature of that procedure and the urgent considerations which led to its adoption by the Congress, were exhaustively reviewed by this Court in its decision in the case of *Yakus* v. *United States*, 321 U. S. 414, wherein it was held that the sixty-day period originally provided in Section 203 (a) of the Act for securing administrative reconsideration of price regulations was a legally adequate period, and that the exclusive procedure after protest under Section 203, provided in Section

204 for obtaining judicial review of the validity of such regulations, was sufficient to meet the requirements of due process of law.

Under Section 203 (a) of the Act only a person "subject to any provision" of a regulation is given the right to "file a protest specifically setting forth objections to any such provision." The natural meaning of this language is that the provision of the regulation in question regulates the business operations of the protestant at the time of the filing of the protest.[4] This construction

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[4] The requirement that the protestant be subject to a regulation at the time of the filing of the protest is reinforced by procedural regulations issued by the Price Administrator pursuant to Section 203 (a) of the Act. Procedural Regulation No. 1, issued February 12, 1942 (7 F. R. 971) provided (Rule 9): "A person is, for the purposes of this Regulation, subject to a provision of a maximum price regulation only if such provision prohibits or requires action by him." This construction, which has been continued (See Section 24 of Revised Procedural Regulation No. 1, 9 F. R. 5791), was expressly approved by the Emergency Court of Appeals in *Buka Coal Co.* v. *Brown*, 133 F. 2d 949.

Petitioners' contention that the imposition of penalties for past violations of a superseded regulation makes them subject to the regulatory provision in question is clearly untenable. It ignores the distinction pointed out by this Court in *United States* v. *Hark*, 320 U. S. 531, between the operation of the regulation and the continuing effect of the statute itself. Having violated the regulation, the petitioners, by virtue of the provisions of Section 4 (a) of the Act, became subject to statutory penalties, and that liability continued until cut off by the applicable statute of limitations.

Also there is no substance to petitioners' attempt to show that the General Maximum Price Regulation and Maximum Price Regulation No. 193 are still applicable to sales of whis-

is inescapable in the light of the entire plan established by the Emergency Price Control Act for administrative and judicial review of price regulations issued under that Act. An examination of that plan discloses numerous reasons for construing Section 203 (a) as authorizing the filing of a protest only for the purpose of presenting objections to regulations which are in force and effect at the time the protest is filed.

Section 203 provides that a protest filed under that section shall be acted upon by the Administrator within a reasonable time, but in no event more than thirty days after filing. If the Administrator does not act promptly, the protestant may obtain an order from the Emergency Court of Appeals requiring the Administrator to take action within a given time. If the Administrator does not act within the time fixed by the Court, the protest is deemed to have been denied. Thus, the section carries a command that objections to price regulations shall be disposed of expeditiously. This can only contemplate regulations which are in force and effect and which are controlling the protestant's business; otherwise

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key such as were involved in the protest proceeding. Section 2.1 of Maximum Price Regulation No. 445, upon which petitioners rely (Pet. Br. 17), permitted the older regulations to remain effective as to transactions, if any, which were outside the coverage of the new regulation. There is no question that transactions of the character with which petitioners were concerned were within the coverage of the new regulatory provisions (See footnote 1, *supra*, p. 3).

the unusual expedition required of the Administrator would be unnecessary. In the face of the gigantic statutory burden placed upon the Administrator to enforce price control and prevent inflation in time of war, it would be unreasonable, we submit, to impute to the Congress an intention to impose on the Administrator the additional and seemingly unnecessary task of going back and determining the validity of a multitude of superseded regulations, while the same Act mandatorily directs that the result in each case be achieved with a high degree of expedition.

The provisions of Section 204 which prescribe the procedure to be followed in obtaining judicial review by the Emergency Court of Appeals of the Administrator's denial of a protest, likewise contain strong implications that a regulation must be in force and effect in order to form the basis of a protest under Section 203 (a). The purpose of the Congress in creating the Emergency Court of Appeals and giving it exclusive jurisdiction to pass upon the validity of price regulations was to expedite final disposition of objections made to such regulations. See S. Rep. No. 931, 77th Cong., 2nd Sess., p. 7, and H. Rep. No. 1409, 77th Cong., 1st Sess., p. 11. Thus, again, expedition is sought because the protested regulation is presently operative. And the judicial relief provided, which is obtainable only in the special court, is that the regulation may be "enjoined

or set aside," in order to terminate the effectiveness of the regulation *in futuro*. This view is further supported by the provision in Section 204 (a) giving power to the Administrator to modify the regulation under attack while the complaint is pending before the Emergency Court of Appeals.[5] A further indication that the protest proceedings were established to deal solely with regulations actually in effect at the time the protest is filed is to be found in the provision in Section 204 (b) which postpones the effectiveness of a judgment of the Emergency Court of Appeals "enjoining or setting aside" any regulation until thirty days after its entry. In reporting on the bill which became the Emergency Price Control Act of 1942, the Committee on Banking and Currency of the Senate said concerning this provision:

> This 30-day period is necessary in order to prevent prices from rising without restraint while the Administrator is modifying or supplanting the regulation in accordance with the judgment of the court or preparing a petition for certiorari to the

[5] This provision does not permit the Administrator to defeat judicial review of the validity of a regulation by a series of amendments or changes while a complaint is pending in the Emergency Court of Appeals. Where the issue has been timely raised that court will retain jurisdiction of the complaint and pass upon the validity of the regulation as it read prior to its amendment. See *Montgomery Ward & Co.* v. *Bowles*, 147 F. 2d 858 (E. C. A.).

United States Supreme Court. [S. Rep. No. 931, *supra*, p. 24.]

That protests were regarded as being appropriately lodged only against regulations in force and effect is further indicated by the Congressional understanding of the relief contemplated by the Price Administrator's "grant" of a protest. Section 203 (a) of the original bill (H. R. 5990, 77th Cong., 1st Sess.) was substantially identical to that section as enacted. In discussing the 30-day requirement for action by the Administrator, the Committee Report stated that the Administrator would grant a protest "by withdrawing or modifying the disputed regulation." (H. R. 1409, 77th Cong., 1st Sess.) This language clearly implies that the regulation would actually be in effect at the time of the Administrator's action.

All of the provisions discussed above and the legislative history of the Act point to the conclusion that the Congress intended the protest procedure to be employed only to secure modification of a regulation which has not been revoked or superseded at the time of the filing of the protest. And the practical considerations which lie behind this restriction on the use of the protest are obvious. The Price Administrator is required by the Act to formulate regulations, orders, and schedules necessary to effectuate control of the maximum prices to be charged in virtually all of the transactions involved in the entire national economy in a period of unprecedented

industrial and financial strain, and his mandate from the Congress is to prevent inflation. Frequent adjustments and modifications of the regulations are essential to achieve effective administration and to avoid disparate enforcement. Thus, with the passage of time the number of revoked and superseded regulatory provisions is certain to become multitudinous. Were these superseded regulations open to attack by protest, it can scarcely be doubted that an extremely large number of protests would be filed merely to obtain administrative, or ultimately judicial, declarations of the rights and liabilities of private parties growing out of transactions negotiated during the life of superseded regulations. Under those circumstances the Administrator might be required, during an economic crisis, to devote a large part of his time and effort to matters no longer germane to price control or inflation. Plainly, then, a holding that the Administrator must undertake to examine and pass upon protests filed against regulations which are no longer in existence, would compel a serious diversion from the Administrator's statutory duty to prevent inflation. That grave danger might lurk in any amendatory proposal which would require the Price Administrator to perform functions not absolutely necessary to effectuate the purposes of the Emergency Price Control Act, was recognized by the Congress when the bills which later became the 1944 Amendment were under consideration.

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In reporting on those bills (S. 1764 and H. R. 4941) the Committees on Banking and Currency of both the Senate and the House of Representatives issued a warning that proposed changes must be consonant with effective administration and enforcement of the Act. See S. Rep. 922, p. 12, and H. Rep. 1593, p. 6, 78th Cong., 2nd Sess.

Inability to file a protest after the objectionable features of a regulation have been administratively corrected does not deprive the defendant in an enforcement proceeding instituted under Section 205* of a reasonable opportunity to have the validity of the applicable regulation judicially determined. The Stabilization Extension Act of 1944 (58 Stat. 638) added to Section 204 of the Emergency Price Control Act the new subsection (e) pursuant to which a defendant in an enforcement proceeding who has failed to file a timely protest prior to the institution of the suit may bring the issue of the validity of the regulation directly to the Emergency Court of Appeals. Thus, since the 1944 Amendment, the Emergency Price Control Act has provided an additional avenue to reach the Emergency Court of Appeals for the purpose of obtaining judicial review of the validity of price regulations which become the basis of enforcement proceedings.

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*The 1945 amendment to Section 204 (e) referred to in Footnote 3, *supra*, p. 8, extended the protection of the provisions of this section to defendants in conspiracy actions brought pursuant to Section 37 of the Criminal Code.

The new procedure permits a defendant in an enforcement proceeding who has failed to obtain judicial review of the validity of the regulation involved through protest proceedings under Section 203 (a) and 204 (a), to seek judicial review by the Emergency Court of Appeals of the validity of the regulation without first exhausting the administrative remedy through protest, provided the court in which the enforcement proceeding is pending finds that the objection to the regulation is made in good faith and that there is reasonable and substantial excuse for the defendant's failure to present his objection in a prior proceeding under Section 203 (a). Petitioners contend (Pet. Br. p. 13) that this provision affords merely a cumulative right which does not interfere with an absolute right granted in Sections 203 (a) and 204 (a) to obtain a judicial review by the procedure there prescribed. We submit that the procedures prescribed in Sections 203 (a) and 204 (a), both before and after the 1944 Amendment, were designed by the Congress for the purpose of granting prospective relief only, and that only under Section 204 (e), which was added by the 1944 Amendment, can proceedings be instituted which are concerned solely with the validity of revoked or superseded regulations.

To allow recourse to the 203 (a) and 204 (a) procedure in cases such as this would permit circumvention of the limitations expressly set forth in the Act upon judicial determinations of the validity of maximum price regulations.

Thus, Section 204 (e) provides that a defendant in an enforcement action may secure leave to file a complaint with the Emergency Court of Appeals only with respect to objections found by the district court to be made in good faith and in regard to which reasonable and substantial excuse exists for the defendant's failure to present such objections in a protest. The Congress thereby clearly evidenced its intent not to open the door for indiscriminate attacks upon the validity of past regulations by those charged with their violation, but rather to limit the privilege to persons who can make the showing required by Section 204 (e) (1). A substantial inroad would be made upon this limitation if in cases such as the present, protest proceedings could be used in lieu of the procedures prescribed by Section 204 (e).

In addition, the use of a protest filed after the institution of an enforcement proceeding might give rise to serious problems of judicial administration. Section 204 (e) (2) prohibits the granting of stays in cases where, as in this case, the protest is filed after institution of the enforcement proceedings.[7] As a result of this

[7] Section 204 (e) (2) of the Act provides that the court in which an enforcement action under Section 205 is pending "shall stay the proceeding * * * (ii) during the pendency of any protest properly filed by the defendant under section 203 *prior* to the institution of the proceeding under section 205 * * *" (italics supplied). The subsection

prohibition against stays in such cases, enforcement proceedings and executions on the judgments therein might well be completed prior to the termination of protest and judicial review proceedings brought under Sections 203 (a) and 204 (a). As a consequence, any judicial determination as to the invalidity of the regulation involved would be wholly futile.

The suggestion in the dissenting opinion of Judge Laws in the *Thomas Paper Stock* case, *supra,* that to give to the original Act now an interpretation that would have prohibited the filing of a protest after the objections to the regulation stated in such protest had been corrected, would raise grave doubts as to its constitutional validity, is, we submit, fully answered by the decision of this Court in the *Yakus* case, *supra.*

II

THE PRICE ADMINISTRATOR DID NOT ERR IN DISMISSING PETITIONERS' PROTEST WITHOUT REFERENCE TO A BOARD OF REVIEW.

Petitioners suggest that the Price Administrator was in error in dismissing their protest without referring it under Section 203(e) of the Act to a Board of Review for consideration (Pet. Br. pp. 6, 10). Petitioners do not clearly state

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further provides: "Except as provided in this subsection, the pendency of any protest under Section 203 * * * shall not be grounds for staying any proceeding brought pursuant to section 205 * * *."

whether this contention is advanced as a ground for reversal which is independent of their contention that the protest should have been considered on its merits by the Price Administrator.[8] If the protest had been properly filed, petitioners would under Section 203 (c) have been entitled to consideration by a Board of Review. But the section does not contemplate such referral in the case of a protest which is subject to dismissal, since the right is limited to a "protest filed in accordance with subsection (a) of this Section" before "denial" by the Price Administrator. The statute thus expressly makes applicable the limitations upon the filing of protests set forth in Section 203 (a) of the Act. The legislative history[9] of this provision also makes it plain that Congress intended Boards of Review to be concerned with the merits of protest proceedings, and did not require the empty gesture of referring to a Board protests which have been improperly filed.

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[8] Petitioners did not list the alleged error of failure to refer the case to the Board of Review among the "Questions Presented" (Pet. Br. pp. 2–3). This point is, however, listed among the "Specifications of Error to be Urged." (*Id.*, p. 6.)

[9] See Senate Report No. 922, *supra*, pp. 10–11; 90 Cong. Rec. (June 6, 1944) 5366–7; Hearings, House Committee on Banking and Currency on H. R. 4376, 78th Cong., 2d Sess., (1944) p. 2170.

III

THE DECISION OF THE EMERGENCY COURT OF APPEALS IN THE CASE OF COLLINS ET AL. V. BOWLES, DOCKET NO. 231, HOLDING VALID THE REGULATION TO WHICH PETITIONERS OBJECT, HAS RENDERED MOOT THE ISSUES IN THE CASE AT BAR

In the "Memorandum for the Respondent" filed in response to the Petition for a Writ of Certiorari filed by petitioners in this case, attention was called to the fact that in the enforcement proceeding brought by respondent against petitioners in the United States District Court for the Western District of Kentucky on account of the sales of warehouse receipts for bulk whiskey, the petitioners had been granted leave by the district court under Section 204 (e) (1) of the Act to file a complaint with the Emergency Court of Appeals (Docket No. 231) setting forth the objections to the validity of the regulations which petitioners were alleged to have violated. It was suggested in that memorandum that the Petition for a Writ of Certiorari appeared to be concerned only with sales of bulk whiskey (Pet. 2–4; cf. Pet. Br. 4, 6), the issue which was then pending on the merits before the Emergency Court of Appeals, and that if this were so, a decision in the latter case might render moot the issues in the case at bar. It was indicated, however, that since the protest filed with the Price Administrator might have been construed as questioning

the validity of the regulation as applied to packaged liquors—a question not available to petitioners in the case pending on the merits in the Emergency Court of Appeals—there was a possibility that the present case would not become wholly moot.

The Emergency Court of Appeals has now rendered its decision on the merits of the complaint filed by petitioners with leave of the district court (Docket No. 231), and has sustained in all respects the validity of the regulation to which petitioners object in the case at bar.[10] We believe that the decision which the Emergency Court of Appeals has now rendered on the merits of the complaint filed under Section 204 (e), affords petitioners all of the relief which they might have obtained by a decision on the merits in the present proceeding. Since they have in fact secured a decision, albeit unfavorable on the merits, they have received the only relief that can be afforded them by this Court on the present writ of certiorari, and the writ should be dismissed on the ground that the cause has become moot. Cf. *St. Pierre* v. *United States*, 319 U. S. 41.

CONCLUSION

The judgment of the court below is correct and should be affirmed, or in the alternative, the writ

[10] Copies of the opinion are being lodged with the clerk.

of certiorari should be dismissed on the ground that the cause has become moot.

Respectfully submitted,

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Solicitor General.

JOHN R. BENNEY,
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RICHARD H. FIELD,
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JACOB D. HYMAN,
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JOHN O. HONNOLD, JR.,
Chief, Court Review Price Branch,
Office of Price Administration.

FEBRUARY 1946

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, 58 Stat. 638, 50 U. S. C. App., Supp. IV, 923–924, are as follows:

* * * * * *

SEC. 203 (a) *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206,*[1] any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.[2] Statements in support of any such regulation,

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[1] As amended by sec. 106 of Stabilization Extension Act of 1944. The section formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

[2] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs: *Provided, however, That, upon the request of the protestant, any protest filed in accordance with subsection (a) of this section after September 1, 1944, shall, before denial in whole or in part, be considered by a board*

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[3] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

of review consisting of one or more officers or employees of the Office of Price Administration designated by the Administrator in accordance with regulations to be promulgated by him. Such regulations shall provide that the board of review may conduct hearings and hold sessions in the District of Columbia or any other place, as a board, or by subcommittees thereof, and shall provide that, upon the request of the protestants and upon a showing that material facts would be adduced thereby, subpenas shall issue to procure the evidence of persons, or the production of documents, or both. The Administrator shall cause to be presented to the board such evidence, including economic data, in the form of affidavits or otherwise, as he deems appropriate in support of the provision against which the protest is filed. The protestant shall be accorded an opportunity to present rebuttal evidence in writing and oral argument before the board and the board shall make written recommendations to the Price Administrator. The protestant shall be informed of the recommendations of the board and, in the event that the Administrator rejects such recommendations in whole or in part, shall be informed of the reasons for such rejection.[4]

* * * * *

SEC. 204 (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant

[4] Italicized provision added by section 106 of the Stabilization Extension Act of 1944.

to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other

evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

* * * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the

docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated. The court in

which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceding brought pursuant to section 205 involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provisions;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section shall not be grounds for staying any proceeding brought pursuant to section 205; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment

setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.[5]

[5] Entire subsection (e) added by sec. 107 (b) of Stabilization Extension Act of 1944.

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SUPREME COURT OF THE UNITED STATES.

No. 393. OCTOBER TERM, 1945.

Christine Collins, A. J. Cummins, Yancey Lee Cummins and Edward J. Miller, Petitioners, vs. Paul A. Porter, Price Administrator.	On Writ of Certiorari to the United States Emergency Court of Appeals.

[April 22, 1946.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

Petitioners were stockholders in a distilling corporation on the dissolution of which in December, 1942, they received as their share of the assets warehouse receipts covering the bulk whiskey owned by the corporation. Early in January, 1943, they sold these receipts at a price above that fixed by the Administrator for bulk whiskey, Maximum Price Regulation 193, 7 Fed. Reg. 6006 (August 4, 1942), on the assumption that the receipts constituted "securities" expressly exempt from the pricing provisions.

On the basis of the sale of these certificates the Administrator, under § 205(e) of the Emergency Price Control Act, 56 Stat. 23, 34; 50 U. S. C. App. § 925(e), brought a suit for treble damages against the petitioner to recover approximately $6,800,000. That suit is still pending. In May, 1945, petitioners, invoking the authority of § 203(a), 56 Stat. 23, 31, 58 Stat. 632, 638; 50 U. S. C. App. § 923(a), sought to have the regulation on which the enforcement proceedings against them were based declared invalid or inapplicable by a protest filed with the Administrator. He dismissed it on the authority of *Thomas Paper Stock Co.* v. *Bowles*, 148 F. 2d 831, the ruling of which we have reversed in *Utah Junk Co.* v. *Porter*, decided this day. Petitioners then went to the Emergency Court, which dismissed the complaint without opinion, and we granted *certiorari*, 326 U. S. —. Prior to the petition for *certiorari*, petitioners obtained leave of the trial court in the treble damage action to file a complaint with the Emergency Court under § 204(e) of the Act, 58 Stat. 632, 639, 50 U. S. C.

App. § 925(e), and on January 10, 1946, that court sustained the validity of the regulation. *Collins* v. *Bowles*, 152 F. 2d 769.

The Government contends that the latter decision of the Emergency Court renders moot the judgment of that Court dismissing the complaint, which is the only judgment now before us. This Court is powerless to decide a case if its decision "can not affect the rights of the litigants in the case before it." *St. Pierre* v. *United States*, 319 U. S. 41, 42. The decision of this case may affect the rights of the litigants. The Emergency Court sustained the challenged regulation. It refused to pass on the applicability of the regulation to the petitioners. It left that question to the District Court before which the treble damage suit is pending. Had petitioners' contentions come before the Emergency Court through the protest proceedings under § 203(a) that court would have adjudicated both issues. *Conklin Pen Co.* v. *Bowles*, 152 F. 2d 764; *Collins* v. *Bowles*, *supra*. And in the event that the Emergency Court had found the regulation inapplicable and such decision had been made before a judgment was rendered in the District Court, its ruling would be binding upon the District Court. Under § 204(e)(2)(ii), consideration of a protest under § 203(a) is not a ground for staying the proceedings in the District Court, since the protest proceeding did not precede the suit in the District Court; and under the same provisions of the Act determination of the protest proceeding under § 203(a) can have no retroactive effect once the District Court has entered its judgment. But the opportunity for securing a decision from the Emergency Court through the protest proceeding before a judgment in the District Court is entered, has practical significance and makes this a living and not a hypothetical controversy.

On the merits the case is governed by our decision in *Utah Junk Co.* v. *Porter*. The petitioner in this case had a right to have his protest considered by the Administrator and, in case of denial, to resort to the Emergency Court of Appeals. The fact that Congress in 1944 gave a limited opportunity to go to the Emergency Court by leave of the District Court before which an enforcement proceeding is pending, § 204(e), neither repealed nor qualified the protest proceeding originally designed by § 203(a). The two modes of securing a hearing on the validity and applicability of the

price regulation are cumulative and not alternative. The Administrator advances no argument to distinguish the case from that of *Utah Junk Co.* v. *Porter*. His contention that the petitioner is not a "person subject to. . . . [the] regulation," § 203 (a), is amply refuted by the continuing liability of the petitioners, *United States* v. *Hark*, 320 U. S. 531, for some $6,800,000, should their arguments as to the invalidity and inapplicability of the regulation be rejected when the case is considered on the merits.

It is superfluous to discuss other issues raised in this case.

Judgment reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.